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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 343.

LEBARON B. COLT, SAMUEL P. COLT, ET AL., APPELLANTS,

vs.

ELIZABETH H. COLT, INDIVIDUALLY AND AS EXECUTRIX, GUARDIAN, AND TRUSTEE, CALDWELL HART COLT, RICHARD D. HUBBARD, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 8, 1881.

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1,2,3,4 Know all men by these presents that we, Le Baron B. Colt and Samuel P. Colt, of Bristol, in the State of Rhode Island, as principals, and Simeon E. Baldwin, of New Haven, in the State of Connecticut, as surety, are holden and firmly bound, jointly and severally, unto Elizabeth H. Colt, individually, and as executor, guardian, and trustee, Caldwell Hart Colt, Richard D. Hubbard, individually, and as executor and trustee, Richard W. H. Jarvis, individually, and as executor, trustee, and administrator, Samuel C. Colt, Matilda C. Root, and Harris Colt, as executors, and George D. Sargeant and Lois F. Sargeant, as executors, in the penal sum of five hundred (500) dollars, to be paid to them, or their certain attorneys, executors, administrators, or assigns; to the which payment, well and truly to be made and done, we, the said obligors, do bind ourselves, and each of us, our heirs, executors, and administrators, and each and every of them, for and in the whole, firmly by these presents.

Signed with our hands and sealed with our seals, at Hartford, 20th day of September, A. D. 1881.

5 The condition of this obligation is such that whereas at a term of the circuit court of the United States in and for the district of Connecticut, holden at Hartford on the third Tuesday of September, 1881, in a suit in equity, depending in said court, between LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. D. Wolf, and Isabella DeW. Colt DeWolf, as complainants, and said obligees, as defendants, and certain others as co-defendants with them, a decree was rendered in favor of said obligees, and against said obligors, and their co-complainants, dismissing their said bill, from which said decree said obligors and their co-complainants appealed in open court, upon the rendition thereof, to the Supreme Court of the United States for the reversal of said decree. Now, therefore, if said appellants shall prosecute their said appeal to effect, and answer all costs if they fail to make their appeal and plea good, then this obligation shall be void, otherwise good.

LEBARON B. COLT. [L. S.]
SAM'L P. COLT. [L. S.]

Signed, sealed, and delivered in the presence of—
JOHN B. PANE,
ISAAC F. WILLIAMS,
Witnesses to LeB. B. C. and S. P. C.

6 SIMEON E. BALDWIN. [L. S.]

Witnesses to S. E. B.:
JOHN H. WHITING.
HENRY ROGERS.

Approved Sept. 20th, 1881.

N. SHIPMAN,
District Judge.

United States Circuit Court, District of Connecticut.

LeBaron B. Colt *et al.*
vs.
Elizabeth Hart Colt *et al.* } In Equity.

At a stated term of said court, held at Hartford, in said district, on the 20th day of September, A. D. 1881.

Present: Hon. Samuel Blatchford, circuit judge; Hon. Nathaniel Shipman, district judge.

And now the above-named complainants, after the final decree herein, both parties being present by counsel in open court, and the complainant having filed the security required by law, moves the court for an appeal of said cause to the Supreme Court of the
6½ United States, which motion is granted and the said appeal allowed, and the parties being present, the usual citation need not be issued.

By the court.

Attest: E. C. MARVIN, *Clerk.*

The return of the judges of the circuit court of the United States for the district of Connecticut, to the foregoing appeal.

The record of the said cause, including the pleadings, proceedings, evidence, opinions, and decree, from which said appeal hath been taken and allowed to the Supreme Court of the United States, follows in these words, viz:

7 Be it remembered that on the 4th day of January, 1879, there was filed in court a bill in equity in the words and figures following, viz.:

United States Circuit Court for the District of Connecticut.

LeBaron B. Colt *et als.*
vs.
Elizabeth Hart Colt *et als.* } In Equity.

Bill for an account and to ascertain and establish the rights and interests of the complainants under the will of Samuel Colt, deceased, and for a decree for the conveyance and payment to the complainants of what may be found due and payable to them, and for general relief.

To the Honorable Justices of the United States Circuit Court for the District of Connecticut, humbly complaining, sheweth unto your Honors:

LeBaron B. Colt, Samuel P. Colt, and Theodora G. Colt, assignee of the right, title, and interest of her son, Edward D. Colt, deceased, under the will of Samuel Colt, deceased, the said LeBaron B., the said Samuel P., and the said Theodora G. Colt, all of Bristol, in the county of Bristol, in the State of Rhode Island, citizens of said State of Rhode Island, Frank E. DeWolt and Isabella D. W. Colt DeWolf, wife of said Frank E. DeWolf, in right of said Isabella,

of San Francisco, in the State of California, and citizens of said State of California, bring this their bill of complaint against Elizabeth Hart Colt, widow of said Samuel Colt, deceased, and executrix of the last will and testament of the said Samuel Colt, deceased; also as trustee under said will for the children of Christopher Colt, deceased; also as administratrix on the estate of Henrietta Colt, deceased, and guardian of Caldwell Hart Colt, a minor under the age of
8 twenty-one years, the said Caldwell Hart Colt being a legatee under said will, and claiming to inherit the interest of his brother, Samuel J. Colt, and his sister, Elizabeth E. Colt, both deceased, legatees under said will; the said Elizabeth Hart Colt also as claiming an interest under said will; Richard D. Hubbard, executor under said will, and as trustee with said Elizabeth Hart Colt, as aforesaid, under said will, also, as claiming an interest under said will; Richard W. H. Jarvis, also executor under said will, and trustee thereunder with Elizabeth Hart Colt and the said Richard D. Hubbard, as aforesaid, also as claiming an interest under said will; Caldwell Hart Colt, minor, and Samuel Caldwell Colt, claiming an interest under said will; all said respondents, above mentioned, being of Hartford, in said State of Connecticut, and citizens of said State of Connecticut; Matilda C. Root, of said Hartford, and a citizen of said State of Connecticut; and Harris Colt, of the city, county, and State of New York, and a citizen of said State of New York, surviving executors of the last will and testament of Elisha K. Root, late of said Hartford, deceased; George D. Sergeant, of said city of New York, and a citizen of said State of New York, and Lois F. Sergeant, of said Hartford, and a citizen of said State of Connecticut, executors of the last will and testament of Luther P. Sergeant, deceased—the said Elisha K. Root and the said Luther P. Sergeant, named as legatees under said will of said Samuel Colt.

And, thereupon, your orators complain and say that heretofore, to wit, on the 6th day of June, A. D. 1856, said Samuel Colt, of said Hartford, then in life, made and published his last will and testament, as of that date duly executed, to pass real and personal estate; a copy of which will, as originally executed and published, is hereunto annexed, marked "A," being part of Exhibit E.

That afterwards, to wit, on the 12th day of January, A. D. 1858, the said Samuel Colt, then in life, made and published a certain codicil of that date to said will, which codicil was duly executed to pass real and personal estates; a copy of which codicil as originally executed and published, is hereunto annexed marked "B," being part of Exhibit E.

9 That afterwards, to wit, on the 2d day of February, A. D. 1859, the said Samuel Colt, then in life, made and published a certain additional codicil, of that date, to said will; which said last-named codicil was also duly executed, to pass real and personal estate, a copy of which is hereunto annexed, marked "C," being part of Exhibit E, and in and by which said last codicil the said

testator confirmed and established said original will, as altered and changed and modified by said two codicils, as and for the last will and testament of the said Samuel Colt; which said copies of said last will and testament and of said codicils hereunto annexed the complainants pray may be taken as a part of this their bill.

And your orators further represent unto your honors that in and by said will and codicils the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis, were appointed executors and trustees for the performance and execution of certain trusts contained in said will and codicils; that thereafter, on the 10th day of January, A. D. 1862, the said Samuel Colt deceased.

That thereafter, on or about the 5th day of February, A. D. 1862, said will and codicils were duly proved and approved in the probate court for the district of Hartford, in said State of Connecticut.

And your orators further show unto your honors that the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis, did then and there accept said appointment, and took upon themselves the offices of executors and trustees for the purposes named in said will and codicils, and then and there gave bonds, as required by law, and otherwise qualified themselves for the faithful performance of the trusts contained in said will and codicils, and thereupon took possession of the property and estate mentioned in said will and codicils, and commenced their duties, and continued to act as joint executors and as joint trustees thereunder, and still continue so to act.

And your orators further show unto your honors that, under and by the terms of said will and codicils, it appertained to the said Le-Baron B. Colt, Samuel P. Colt, Edward D. Colt, Isabella D. W. Colt DeWolf, children of Christopher Colt, deceased, brother of the said Samuel Colt, to have and take, under said will, as set forth in in the following clauses, namely:

10 "To the children of my late brother, Christopher Colt, I give and bequeath as follows: To Isabella DeWolf Colt, an annuity of seven hundred and fifty dollars per year until she shall arrive at the age of twenty-one years, to be appropriated to her support, maintenance, and education; and when she shall have arrived at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of the stock of said Colt's Patent Fire Arms Manufacturing Company. To each of the other children of my said brother, Christopher Colt, I give and bequeath an annuity of five hundred dollars a year until they shall respectively arrive at the age of twenty-one years, for their support, education, and maintenance; and to each of said children last named, as they shall respectively arrive at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also

one hundred shares of stock in Colt's Patent Fire Arms Manufacturing Company; to have and to hold to them and their representatives and assigns forever."

The provisions of said clause, so far as they applied to one George D. W. Colt, eldest son of the said Christopher, were subsequently, by codicils to said will, revoked and cancelled, as hereinafter set forth.

And your orators further show that in and by said will it was also provided as set forth in the following clause, namely:

"I also give and bequeath to my executors, and their successors in said office, five hundred shares of the stock of said Colt's Fire Arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the sum may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock, and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate."

The said children of said Christopher Colt, except said eldest son, George D. W., were substituted for the children of said James B. Colt, under said clause, by codicil to said will, as hereafter set forth.

11 And your orators further show unto your honors, that the matter herein in controversy by this bill exceeds the sum and value of five hundred dollars.

And your orators further show unto your honors, that by the said codicil to said will, a copy of which is hereunto annexed, marked "C," it was further provided as follows, namely:

"I give to the eldest son of my brother, Christopher Colt, a legacy of one hundred dollars, and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to wit, five hundred shares of the stock of the Colt's Patent Fire Arms Manufacturing Company, which, in and by said original will, is bequeathed to my executors in trust for the use of the children of said James B. Colt; to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children, in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil, as and for my last will and testament."

And your orators further showeth unto your honors, that in and by said original will it was provided as follows, namely:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath and devise as follows: All the remaining stock of said Colt's Patent Fire Arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified
12 legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions."

And your orators further show unto your honors, and aver the fact to be, that up to the time of filing this their bill the said children of the said Christopher Colt have only received from the estate of the said Samuel Colt, under said will, said one hundred shares each of said stock legacies given to them under said will. Four hundred and sixty shares of the residuary stock in respect to said legacies, of one hundred shares each, and the accumulations thereon, said twenty-five hundred dollars gross legacies to each, and the residuum thereon, and said five hundred shares of said stock and didends thereon given in trust for them as aforesaid; said last five hundred shares of stock so held in trust, with the accumulations thereon, having been paid over to the said children of the said Christopher on the 12th day of January, A. D. 1873.

Whereas your orators claim that in addtion to what said children of the said Christopher have already received, as above stated, they are, and were, under the provisions in their behalf contained in said will and codicils, entitled to a much larger number of the shares of said stock, to wit:

——— shares, and to a much larger sum of money than they have received to wit, the sum of ——— dollars accumulation upon such additional stock.

And your orators further show unto your honors, that said children of said Christopher are entitled to such additional stock and accumulations thereon, in the manner and for the reasons hereinafter set forth, namely:

First.

Because they submit and claim that in respect of said legacies of stock of one hundred shares to each of said children of Christopher Colt, under a true and just construction of said will and codicils, they were entitled each to a larger share of said residuary stock, to wit:

13 ——— shares additional to what they have already received, as above stated, and accumulations thereon.

Second.

Because they submit and claim that said gift to said trustees, under said will and codicil, of five hundred shares of said stock, in trust for the children of said Christopher Colt, in place of the children of said James B. Colt, entitle the said children of the said Christopher, to wit, the said LeBaron B., Samuel P., Edward D., and Isabella, under said residuary clause of said will, above set forth, to have and receive such proportion of the excess of the capital stock of the said Colt's Patent Fire Arms Manufacturing Company, owned by the said testator at the time of his decease, above the amount of said stocks specified and disposed of in said will, as said five hundred shares thereof bears to the whole amount of legacies thereof given in said will and codicils, and the dividends declared and accrued thereon since the deceased of the said testator.

Third.

Because they submit and claim that said children of said Christopher are also entitled, under said residuary clause of said will, to such proportion of the five hundred and seventy-five shares of residuary stock, in which the said James B. Colt, recently deceased, on the 28th day of October, A. D. 1878, claimed a life estate (now in the hands of said executors) as said gift of five hundred shares of stock in trust, and said legacies of one hundred shares each of said stock to said children, (making 900 shares in all,) bears to the whole amount of legacies of stock given in said will.

And your orators further represent, that at the time of the decease of the said Samuel Colt, to wit, on the 10th day of January, A. D. 1862, the said Edward D. Colt, the said LeBaron B. Colt, and the said Samuel P. Colt, children of the said Christopher Colt, were infants under the age of twenty-one years. And said children, except the said Edward D., continued to be infants,
14 under the age of twenty-one years, until long after the probate of said will, and the termination of proceedings had in the superior court and supreme court of errors of said State of Connecticut, with reference to the said will and codicils, hereinafter referred to. And that the rights of said children, under said will and codicils, could only be lawfully asserted and maintained by a guardian *ad litem*, in the matter of their claim to residuary stock in respect of said legacy of one hundred shares each, and by said executors, in their capacity as trustees, in the matter of said children's claim to residuary stock in respect of said five hundred shares given to said executors in trust.

And your orators aver the fact to be that said children were not, in said proceedings, or in any proceedings with reference to their claims to residuary stock, in respect of said legacies of one hundred shares each, represented at any time by any guardian *ad litem*, or by

any one in any capacity; and in respect to their rights to residuary stock under said gift to said trustees for them of said five hundred shares of stock, in the place of the rights of said children being asserted and maintained by said trustees, your orators are quite recently informed and advised, to wit, on the ——— day of December, 1878, that said trustees not only did not appear and urge the claims of said children in respect of said residuary stock under said gift of five hundred shares of stock, but waived the same, and by counsel and by written brief, a copy of which is hereto annexed, marked "D," and made part hereof, opposed the claims of said children, in respect of said residuary stock, under said legacy of five hundred shares in trust, so that, in fact, as your orators aver, the claims of said children, under said will, were at no time legally made, set up, heard or passed upon in any of the proceedings with reference to said will and codicils.

And your orators further aver the fact to be that it was the duty of said executors, in their capacity as trustees, under said will and codicils, to guard and protect the interests of said children, in respect of said gift of five hundred shares in trust as aforesaid.

And now your orators further represent that they are advised, and believe it to be true, that had said children been represented in the proceedings aforesaid had in reference to said will and codicils, and their claims presented and urged in respect to said legacies, to them directly, of said one hundred shares each, and in respect of said legacy of five hundred shares in trust, said additional shares of stock and accumulations thereon, as hereinbefore claimed, would have been delivered and paid over to them.

And your orators are further advised that by reason of the said waiver of said trustees of the claims of said children of said Christopher Colt, in respect of said legacy of five hundred shares of stock and the residuum thereon, and by reason of their failure to insist upon the rights of said children under said trust legacy and their opposition as aforesaid, the said trustees have rendered themselves liable to your orators in such amount as would equal the value of the additional shares of stock and accumulations thereon, as hereinbefore claimed.

And your orators had well hoped that no controversies would have arisen between your orators and the said respondents, with reference to the claims of your orators under said will and codicils, as hereinbefore set forth, and that the said stock and accumulation thereon would have been delivered and paid over to your orators under said will and codicils, as hereinbefore claimed, as in equity and good conscience your orators submit should have been done; but your orators aver that the said respondents, the said Elizabeth H. Colt, the said Hubbard and the said Richard W. H. Jarvis, executors and trustees under said will, though requested, refuse to comply with the reasonable requests of your orators in this behalf, made at times, pretending that said children of said Christopher are not entitled, by reason of said legacy of five hundred shares of

said stock given to said trustees in trust for them as afoaesaid, in place of the isssue of said James B. Colt, to any share, either in the residuary stock originally in the hands of said executors to be distributed under the residuary clause of said will, or to any share in said five hundred and seventy-five shares of said residuary stock now come into the hands of said executors, upon the decease of said James B. Colt, in which the said James B. Colt claimed and has enjoyed a life estate, nor to any additional residuary stock and dividends originally in the hands of said executors in respect
16 of said legacies of one hundred shares each, to the said children of said Christopher Colt, as hereinbefore set forth and claimed, and in support of such pretenses allege said certain proceedings, hereinbefore referred to, had in the superior court and the supreme court of errors of the said State of Connecticut, which it is pretended affect the rights of your orators under said will and codicils, a copy of which said proceedings are hereunto annexed marked "E," and made part of the complainants' bill.

Whereas your orators aver and maintain that, notwithstanding said proceedings, the complainants, in truth and fact, are entitled to such additional shares in said residuary stock and accumulations thereon, as herein set forth, and are not barred from claiming and receiving said additional residuary stocks and accumulations thereon because of said proceedings of said courts, and for the reasons following, that is to say:

First.

Your orators aver that, at the time when said proceedings were instituted, the said Edward D. Colt, the said LeBaron B., and the said Samuel P. Colt were minors under the age of twenty-one years, the said Edward D. arriving at his majority pending said proceedings, to wit, on the 28th day of May, 1865, the said LeBaron B. and the said Samuel P. continuing to be minors until after the termination of said proceedings, the said LeBaron B. arriving at his majority on the 25th day of June, A. D. 1867, and the said Samuel P. on the 10th day of January, A. D. 1873, and that neither of said minor children were represented in said proceedings at any stage thereof, from the commencement to the end, by a guardian *ad litem*. The only guardian of said children pending said proceedings was a general guardian of the persons and estates of said children, to wit, their mother, the said Theodora G. Colt, appointed by said probate court for the district of Hartford; and your orators submit that the said Theodora G. Colt, general guardian of said children, had no power or authority to represent them in said proceedings upon the questions of their rights, interests, and claims under said will and codicils, especially in respect
17 of said legacies of one hundred shares each to said children, or in any other respect, and did not, in fact, at any time appear in said proceedings.

Second.

Because the questions affecting the rights and interests of said children of Christopher Colt, in respect to said legacy of five hundred shares given to said executors in trust for them, could not be considered or passed upon in said proceedings, or in any proceedings, until the youngest of said minor children, to wit, the said Samuel P. Colt, arrived at the age of twenty-one years.

Third.

Because the said Elizabeth Hart Colt and Richard D. Hubbard and Richard W. H. Jarvis, trustees, as aforesaid, under said will and codicils of the said children of Cristopher Colt, were not summoned to appear in said proceedings in their capacity as said trustees, and, as your orators aver, entered no appearance in said proceedings, in their capacity as said trustees, in behalf of said children, and employed no counsel to appear before said courts in their behalf as trustees for said children, and in defence and maintenance of the rights of said children under said residuary clause in said will, in respect of said gift of five hundred shares of said stock to said trustees, as aforesaid; and no issues were made up, or caused to be made up, by said trustees before said courts, in said proceedings, involving the rights and interests of said children, under said will and codicil, to said residuary stock, in respect of said gift to said trustees, as hereinbefore claimed.

Fourth.

Because, if said Colt, Hubbard, and Jarvis, summoned to appear in said proceedings, as executors under said will, were deemed and adjudged to be, for that reason or any other, before said courts in their capacity as trustees for said children, then your orators aver and insist that said proceedings cannot be held in any manner to affect or impair the rights of said children under said will and codicils, because as your orators aver the
18 fact to be that said executors, in their capacity as trustees for said children, not only did not appear for and in behalf of said children upon the question of their rights under said trust to said residuary stock, and urge the same upon the attention of said courts before which said proceedings were pending, but, as your orators aver the fact to be, said trustees, by their counsel, to wit, appeared before said courts, and by brief, hereinbefore referred to, and argument of counsel, actively opposed the claim of said children to said residuary stock in respect of said gift of five hundred shares in trust.

And your orators further show unto your honors, that they claim and insist that if in any manner, by reason of being summoned as executors in said proceedings, or otherwise, the said trustees of said children of said Christopher Colt, were or are deemed to have been before said courts, in their capacity as trustees for said children, by

their failure to urge and defend the rights of said children, under said will and codicils, to said residuary stock, in respect of said gift to said trustees, of said five hundred shares of stock, by waiving and by making opposition to said rights of said children, as aforesaid, the said trustees have rendered themselves liable to your orators to the same extent as if no such proceedings had been had.

Wherefore, as not to comply with the reasonable demands of your orators, as hereinbefore set forth, tends to the manifest wrong and injury of your orators, and inasmuch as your orators are without remedy in the premises in accordance with the strict rules of the common law, and can only have relief in a court of equity, where such matters are recognizable.

To the end, therefore, that said respondents may full, true, and perfect answer make to the matters herein stated and charged, and that as fully as if hereafter particularly interrogated, and that said stock claimed by your orators under said will and codicils, and the accumulations therein may be delivered and paid over to your orators by said executors and trustees, and that they may be decreed to render a full, true, and just account of their doings,
19 with reference to the residuary stock and accumulations therein, coming into their hands as executors and trustees, as aforesaid, and especially with reference to the residuary stock and the accumulations thereon in respect of and appertaining to said gift of five hundred shares of stock to them in trust for said children, and further, to the end that in case said executors, in their capacity as trustees for said children, should be found to have been before said courts in said proceedings had in said superior and supreme courts of Connecticut, that upon the ground that they, in said capacity, instead of protecting, opposed the interests of said children under said will, as hereinbefore stated and charged, they may be decreed to pay over to your orators such sum or sums of money as would, upon accounting, be found to be equal to the interest of your orators in said stock and accumulations as hereinbefore claimed, and that your orators may have such other and further relief as to your honors shall seem meet. May it please your honors to grant unto your orators the writ of subpœna *respondendum* issuing out of and under the seal of the honorable court, directed to the said respondents, commanding them to appear at a day fixed before this honorable court, then and there to answer the premises and to perform and abide by such order and decrees herein as to this honorable court may seem required by the principles of equity and good conscience, and your orators will ever pray.

LEBARON B. COLT.
SAM'L P. COLT.
FRANK E. DEWOLF AND
ISABELLA DEW. C. DEWOLF,
By their Attorney, Sam'l P. Colt.
THEODORA G. COLT,
By her Attorney, LeBaron B. Colt.

SIMEON E. BALDWIN, *Solicitor and of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of Connecticut, }

I hereby certify that LeBaron B. Colt and Samuel P. Colt, both being duly cautioned and sworn, on the third day of January,
20 A. D. 1879, deposed and said, that they were the complainants in the foregoing bill named, and had read the same, and that the bill was true, except as to those matters stated to be on information and belief, and that as to those they verily believed it to be true.

In witness whereof, I have hereunto set my hand and affixed my official seal, this fourth day of January, A. D. 1879.

[L. S.] WM. K. TOWNSEND,
Notary Public.

A. & A. D. PAYNE,
COLWELL AND COLT,
Counsel, Providence.

And on the same day a writ of subpœna issued out of court directed to the said defendants, which was duly served and returned, and which, with the return of service endorsed thereon, is in the words and figures following, viz:

21 [SEAL.] The President of the United States of America to the marshal of the District of Connecticut, sendeth greeting:

You are hereby commanded to summon Elizabeth Hart Colt, executrix of the last will and testament of Samuel Colt, deceased, and trustee under said will for the children of Christopher Colt, deceased, and administratrix on the estate of Henrietta Colt, deceased, and guardian of Caldwell Hart Colt, a minor and legatee under said will, and claiming the interest of his brother, Samuel J. Colt, and of his sister, Elizabeth E. Colt, both deceased, legatees under said will, and the said Elizabeth Hart Colt, also as claiming an interest under said will; Richard D. Hubbard, executor under said will, and as trustee with said Elizabeth Hart Colt as aforesaid under said will; and as claiming an interest under said will; Richard W. H. Jarvis, also executor under said will, and trustee thereunder with Elizabeth Hart Colt, and the said Richard D. Hubbard as aforesaid, also as claiming an interest under said will; Caldwell Hart Colt, minor, and Samuel Caldwell *Caldwell* Colt, claiming an interest under said will, the said respondents before mentioned being of Hartford, in the State and district of Connecticut; Matilda C. Root, of said Hartford, and Harris Colt, of the city, county, and State of New York, surviving executors of the last will and testament of Elisha K. Root, late of said Hartford, deceased, Geo. D. Sargeant, of said city of New York, and Lois F. Sargeant, of said Hartford, executors of the last will and testament of Luther P. Sargeant, deceased, the said Elisha K. Root and the said Luther P. Sargeant named as legatees under said will of said Samuel Colt, all respondents herein,

22 to appear before the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of February, 1869, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said respondents in said court by LeBaron B. Colt, Samuel P. Colt, and Theodora G. Colt, assignee of the right, title, and interest of her son, Edward D. Colt, deceased, under the will of Samuel Colt, deceased, the said LeBaron B., the said Samuel P., and the said Theodora G. Colt, all of Bristol, in the county of Bristol, in the State of Rhode Island, citizens of said State of Rhode Island, Frank E. DeWolf and Isabella D. W. Colt DeWolf, wife of said Frank E. DeWolf, in right of said Isabella, of San Francisco, in the State of California, and citizens of said State of California, and then and there to answer the same, and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of February, 1879.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 4th day of January, A. D. 1879.

EDWIN E. MARVIN, *Clerk.*

The defendants are required to enter their appearances in said cause in the clerk's office of said court on or before the day at which this writ is returnable or, by the rules of said court, said bill will be taken as confessed.

EDWIN E. MARVIN, *Clerk.*

S. E. BALDWIN,
Complainants' Solicitor, New Haven, Conn.

23 UNITED STATES OF AMERICA, *District of Connecticut, Hartford County,* } *ss:*

HARTFORD, *January* 6 *and* 7, 1879.

Then and there, on the 6th day of January, A. D. 1879, I served this writ by delivering to and leaving with Richard W. H. Jarvis, at the usual place of abode of Elizabeth Hart Colt, herein named, five true and attested copies hereof, to wit:

One copy for Elizabeth Hart Colt, executrix of the last will and testament of Samuel Colt, deceased.

One copy for Elizabeth Hart Colt, trustee under said will for the children of Christopher Colt, deceased.

One copy for Elizabeth Hart Colt, administratrix on the estate of Henrietta Colt, deceased.

One copy for Elizabeth Hart Colt, guardian of Caldwell Hart Colt, a minor, and one copy for Elizabeth Hart Colt, as claiming an interest under said will.

And I also, on the said 6th day of January, left with Richard W. H. Jarvis, herein named, three true and attested copies hereof, to wit:

One copy for the said Jarvis, executor under said will.

One copy for the said Jarvis, as trustee thereunder, and one copy for the said Jarvis, as claiming an interest under said will.

And on the same day I delivered to and left with Richard D. Hubbard, within named, three true and attested copies hereof
24 to wit: One copy for the said Hubbard as executor under said will. One copy for said Hubbard, as trustee under said will, and one copy for the said Hubbard, as claiming an interest under said will.

And I also on the same day delivered to and left with Samuel Caldwell Colt, herein named, a like, true, and attested copy hereof.

And on the same day I delivered to and left with Lois F. Sargeant, herein named, a like copy hereof, and I left with her, the said Lois, a like copy for the within named George D. Sargeant, and the said George D. Sargeant afterwards acknowledged service of the same, which acknowledgment is hereto annexed.

HARTFORD, *January* 6, 1879.

I hereby acknowledge receipt of a copy of a writ of subpœna *In re Le*Baron B. Colt *et al vs.* Elizabeth Hart Colt *et al.*, and accept service of the same, waiving all further notice and service.

GEO. D. SARGEANT.

And on the seventh day of January, inst., I delivered to and left with the within named Matilda C. Root a like true and attested copy hereof.

The within named Harris Colt is not a resident of this
25 State, and cannot be found within my precincts.

Attest: JOS. D. BATES,
U. S. Marshal.

Fees.

15 services	$30 00
15 copies and en'd	15 00
Travel	1 80
Endorsement on original	50
	$47 30

26 And on the same day Simeon E. Baldwin, Esq., entered his appearance for complainants, and on the 1st day of March, 1879, C. E. Perkins, Esq., entered his appearance for Mrs. E. H. Colt, R. D. Hubbard, R. W. H. Jarvis, Samuel C. Colt, and Caldwell H. Colt, defendants.

27 And on the 1st day of February, 1879, amendment to bill was filed, in the words and figures following, viz:

In the Circuit Court of the United States for the District of Connecticut.

LEBARON B. COLT *et als.*
vs.
ELIZABETH H. COLT *et als.*
} In Equity.

Amendments to Bill.

The complainants in the above-entitled bill hereby amend the same, as follows:

On page three of the (printed) bill strike out the words "and trustees" and "and as joint trustees" in the last paragraph but one on said page. Also interline in said paragraph, after the words "faithful performance of the trusts," the words "appertaining to said office of executors and."

Insert on the sixth page of the bill, after the fourth line thereof, these words: "And your orators further show that said Theodora G. Colt is the widow of said Christopher Colt and the mother of said LeBaron B. Colt, Samuel P. Colt, and Isabella DeW. Colt DeWolf, and also of Edward D. Colt, deceased, and on the sixth day of June, 1870, acquired, by purchase and due assignment from LeBaron B. Colt, the administrator of the estate of said Edward D. Colt, all the right, title, and interest of said estate, in the residuary estate and stock and the accumulations thereon, formerly belonging to the estate of Samuel Colt, late of said Hartford, deceased, which is hereinafter particularly mentioned, as more fully appears by said assignment to her, ready in court to be shown.

"And your orators further show that at the decease of said Samuel Colt he owned many more shares of stock in said Colt's
28 Patent Fire-arms Manufacturing Company, to wit, fifty-three hundred and forty-six (5,346) shares or more, than were by him specifically bequeathed, which additional shares of stock were not needed or used for payments of debts or charges against his estate, but properly passed under said residuary clause of his will."

On page seven, after the words "said will," at end of first paragraph, in heading Third, insert the following:

"Fourth.

"And your orators further show that said James B. Colt died on the twenty-eighth day of October, 1878, and that there now remains in the hands of said executors and trustees named in said will, $574\frac{26}{31}$ shares of the stock of said company, the income of which has been by them paid to said James B. Colt, during his life; and that said stock now remains for distribution among those properly entitled thereto under the residuary provisions of said will; and that, forasmuch as your orators have hitherto received less than their due and lawful proportion of the residuary stock, left by said Samuel Colt, and of the accumulations thereon, your orators are now equitably entitled to demand and receive from said executors and

trustees named in said will the whole of said 574 $\frac{26}{31}$ shares of stock, in order to aid in making them equal with said other residuary legatees, and in carrying out the provisions of said will and codicils."

On page eight, line twenty-two (22), strike out the word "trustees," and insert in lieu thereof the word "executors."

Strike out on page eight the last paragraph but one, beginning "And your orators further aver."

On page nine strike out in the second paragraph (which begins on the seventh line) the word "trustees" wherever it occurs, and substitute therefor the word "executors" in each case.

On page twelve, after the seventh line, fill the blank with the words "Origen S. Seymour and W. W. McFarland, Esquires."

Insert on page twelve, at the end of the first paragraph, (which ends with the words "in trust,") the following:

29 "Fifth.

"And your orators further aver, as a fifth reason as aforesaid, that said Theodora G. Colt, at the time of and during the pendency of said proceedings by James B. Colt, in said superior court and said supreme court of errors, was unacquainted with legal business and formalities, and owning thereto did not apprehend it to be her duty as guardian of said minor children, to appear in response to said citation annexed to his said bill in the superior court in their behalf, or as such guardian; and did not in fact employ counsel to appear, or herself appear in any way to defend against said bill, or to answer thereunto, or to become a party to the same in either of said courts; and also that the said Isabella DeW. Colt DeWolf was, at the time of said proceedings by and on said bill, also unacquainted with legal business, and owning thereto employed no counsel to appear for her, or to defend her interest, and supposed, as did also her said husband, until on or about the first day of January, 1879, that said executors had advocated her claims, in her behalf, as hereinafter set forth, and had endeavored to present them properly to said superior court and said supreme court of errors in her behalf."

And your orators further say that all debts and charges due from said estate of Samuel Colt have been paid and satisfied; and that after the said decrees of said supreme court of errors and said superior court, to wit, on the second day of July, 1866, said executors rendered an administration account to said probate court, wherein they credited to themselves, under date of June 18, 1866, as follows:

"By trust fund, 500 shares of stock, set aside to trustees for Christopher Colt's children, $100,000."

And also credited themselves as follows:

"By stock held for James B. Colt, life interest, 574 $\frac{26}{31}$ shares.
By stock held for LeBaron B. Colt, 214 $\frac{30}{31}$ shares.
By stock held for S. Pomroy Colt, 214 $\frac{30}{31}$ shares."

And also on January 20, 1873, said executors and trustees made a further return to said probate court, wherein they charge themselves, among other things, as follows:

30 "There remains undisposed of, for the benefit of whomsoever may be entitled thereto, the remainder in the five hundred and seventy-four $\frac{26}{31}$ shares bequeathed to James B. Colt for life."

All of which fully appear by the records of said probate court, a certified copy whereof your orators have ready in court to be shown.

And so your orators complain, and say unto your honors, that said Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H. Jarvis, executors, on the eighteenth day of June, 1866, assumed to act as trustees, under said bequests to them in trust for your orators, and have ever since continued to act as such trustees, and are accountable as such unto your orators touching all the matters and things pertaining to said trust as created by said will; and, as your orators are advised, now hold in their hands in trust for your orators said five hundred and seventy-four $\frac{26}{31}$ shares of said stock in which said James B. Colt formerly claimed a life estate.

LEBARON B. COLT.
SAMUEL P. COLT.
FRANK E. DEWOLF AND
ISABELLA DEW. C. DEWOLF,
By their Attorney, Samuel P. Colt.
THEODORA G. COLT,
By her Attorney, LeBaron B. Colt.

SIMEON E. BALDWIN,
Solicitor and of Counsel for Complainants.

31 UNITED STATES OF AMERICA, }
District of Rhode Island, } *ss:*

I hereby certify that LeBaron B. Colt and Samuel P. Colt, both being duly cautioned and sworn, on the thirtieth day of January, A. D. 1879, deposed and said that they were the complainants in the foregoing bill named, and had read the same; and that the said bill was true, except as to those matters stated to be on information and belief, and that as to those they verily believe it to be true.

In witness whereof, I have hereunto set my hand and affixed my official seal, this thirtieth day of January, A. D. 1879.

[L. S.] WALTER H. BARNEY,
Notary Public.

A. & A. D. PAYNE,
COLWELL & COLT,
Counsel, Providence.

32 And on the 1st day of March, 1879, Samuel C. Colt and Caldwell Hart Colt, a minor, by Elizabeth Hart Colt, his guardian, filed demurrer in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut.

LeBaron B. Colt *et al*
vs.
Elizabeth Hart Holt *et al.* } In Equity.

Demurrer of Samuel C. Colt, Caldwell Hart Colt, a minor, by Elizabeth Hart Colt, his guardian, Defendants.

And now these defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

First. That it appears by the said bill that the same is exhibited by the said complainants against these defendants, and also
33 against Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis, as defendants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested, and by reason of such distinct matters these defendants are put to unnecessary charges and expenses in matters which in no way relate to or concern him.

Second. Also, for that said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against these or any of the defendants.

Wherefore, and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs.

34 SAMUEL C. COLT.
CALDWELL HART COLT,
By his Guardian, Elizabeth H. Colt.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

CHAS. E. PERKINS,
Of Counsel for the Defendants.

35 And on the same day Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis filed demurrer in the words and figures following, viz.:

Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH HART COLT *et al.* } In Equity.

Demurrer of Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis, Defendants.

And now these defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show—

First. That the said bill is brought against these defendants, as executors of the last will of Samuel Colt, deceased, to obtain from them, as such executors, among other things, a transfer of certain stock belonging to said estate, which is claimed by the peti-
36 tioners to belong to them, and also against these defendants personally to obtain from them damages for an alleged breach of duty, as trustees, under said will, of certain stock and otherwise, which two distinct and separate causes of action against these defendants in said two capacities cannot and ought not to be joined in one bill, and said bill is therefore demurrable for multifariousness and misjoinder.

Second. And for further cause of demurrer these defendants say that it appears by said bill that, so far as regards said five hundred shares and any residuary interest of the petitioners therefrom, and so far as regards any residuary interest in said stock belonging to the petitioners in respect to said legacies of one hundred shares each, that the respective rights of the petitioners and the defendants therein have already been settled by the decree of a court having jurisdiction thereof, and that the petitioners have not, by their said bill, made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed for
37 from or against these defendants.

Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any other or further answer to the said bill, or any of the matters and things therein contained, and pray hence to be dismissed with their costs.

ELIZABETH HART COLT,
RICHARD D. HUBBARD,
RICHARD W. H. JARVIS,
By their Counsel, Thos. E. Perkins.

I hereby certify that, in my opinion, the foregoing demurer is well founded in point of law.

CHAS. E. PERKINS,
Of Counsel for the Defendants.

And said cause having been argued on the demurrer, on the 16th day of August, 1879, opinion of the court was filed in words and figures following, viz:

38 Circuit Court of the United States for the District of Connecticut.

LeBaron B. Colt and others
vs.
Elizabeth Hart Colt and others.

Blatchford, J.: Whatever may be the scope of the demurrers, the defendants' counsel state, in their brief, that the defendants, at this stage of the case, make no objection to so much of the bill as claims that the plaintiffs have never received from the executors the full amounts to which they were entitled under the will of the residuary stock and the dividends thereon, and that the allegations of the bill in that regard are sufficiently well pleaded to require an answer. So, also, whatever may be the scope of the demurrer, the defendants counsel state, in their brief, that the defendants do not object at present to so much of the bill as sets up that certain litiga-

39 tion has been had in the State courts, but that does not conclude the plaintiffs. These statements are understood to amount to a consent that the court may overrule the demurrer of S. C. Colt and C. H. Colt, so far as regards the second cause of demurrer therein, and may overrule the demurer of E. H. Colt, R. D. Hubbard, and R. W. H. Jarvis, so as regards the second cause of demurrer therein.

The bill prays that the defendants, E. H. Colt, Hubbard, and Jarvis, as executors and as trustees for the children of C. Colt, may deliver and pay over to the plaintiffs the stock and the accumulations thereon which they may claim, and may render an account of their doings with reference to the residuary stock and accumulations thereon coming into their hands as executors and trustees; and further, that in case said executors, in their capacity as trustees for said children, should be found to have been before

40 the State courts in the proceedings referred to, then, upon the ground that they, in said capacity, instead of protecting, opposed the interests of said children under the will, they may be decreed to pay over to the plaintiffs such sums of money as would, upon accounting, be found to be equal to the interest of the plaintiffs in said stock and accumulations as claimed in the bill. The bill alleges that the said executors failed to urge and defend the rights of said children under the will to certain stock in respect of a gift to them therein of certain stock as trustees for said children, by waiving and making opposition to said rights of said children, and claims that if said executors were or are deemed to have been before said courts, in their capacity as trustees for said children, they have rendered themselves liable to the plaintiffs to the same extent as if no such proceedings had been had. S. C.

41 Colt and C. H. Colt, who are made defendants, as having an interest under the will, demur to the bill, on the ground that it is brought against them, and also against E. H. Colt, Hubbard, and Jarvis for several distinct matters and causes, in many whereof, as appears by the bill, said demurring defendants are in no way interested. The defendants, E. H. Colt, Hubbard, and Jarvis demur, to the bill, on the ground that it is brought against them as executors to obtain from them, as executors, among other things, a transfer of certain stock belonging to said estate which is claimed by the plaintiffs to belong to them, and also against said demurring defendants personally to obtain from them damages for an alleged breach of duty as trustees under said will of certain stock and otherwise. And that said two distinct and separate causes of action against them in said two capacities cannot and ought not to be joined in one bill.

42 S. C. Colt, C. H. Colt, and the three executors personally, are all of them legatees under the will of some of the stock, and are therefore all of them necessary parties to any suit brought to adjudicate as to how the residuary shares of stock shall be disposed of. They are all of them necessary parties, so far as concerns the relief prayed for other than that against the executors personally. But it is contended that S. C. Colt and C. H. Colt have no concern in the matters involved in the relief prayed for against the executors personally; that they are interested only in the question as to the right of the plaintiffs to more of the estate than they have had; that if it be determined that the plaintiffs can have no more of the estate, S. C. Colt and C. H. Colt will have no further concern with the case, and the question of neglect of duty by the executors, and their liability personally therefor will remain, with which question S. C. Colt and C. H. Colt will have no concern.

43 These views seem to be well founded, and under the authorities on the subject the demurrer of S. C. Colt and C. H. Colt must be allowed, so far as the first cause of demurrer therein is concerned.

As to the other demurrer, it is quite clear that the basis for relief against the estate is that the plaintiffs have a claim against the estate, and that the basis for relief against the executors personally is that the plaintiffs have no claim against the estate. These are inconsistent grounds and cannot be joined. (Shields *vs.* Barrow, 17 How., 130; Wilkinson *vs.* Dobbie, Blatchf. 12, C. C. R., 298.)

It follows that the demurrer of E. H. Colt, Hubbard, and Jarvis must be allowed, so far as the first cause of demurrer therein is concerned.

As neither one of the two demurrers is wholly overruled or wholly allowed, no costs are given to either party. The plaintiffs may move on notice, under Rule 35, to be allowed to amend their bill

44 as to the matters in respect of which the demurrers are allowed.

A. P. Hyde & C. E. Perkins, for the defendants. A. & A. D. Payne, Colwell & Colt, and Simeon E. Baldwin, for the plaintiffs.

45 And on the 16th day of September, 1879, amendment to bill was filed in the words and figures following, viz.:

United States Circuit Court, District of Connecticut.

LeBaron B. Colt *et al.* } In Equity.
vs.
Elizabeth H. Colt *et al.* }

Motion for leave to Amend.

In the above-entitled cause the plaintiffs pray that they may have leave to amend their bill, as follows, under the 35th rule, to wit:

By striking out on page 9 of the bill, as printed, the words:

"And your orators are further advised that by reason of said waiver of said executors of the claims of said children of said Christopher Colt in respect of said legacy of five hundred shares of stock and the residuum thereon, and by reason of their failure to insist upon the rights of said children under said trust legacy, and
46 their opposition as aforesaid, the said executors have rendered themselves liable to your orators in such amount as would equal the value of the additional shares of stock and accumulations thereon, as hereinbefore claimed."

Also by striking out on page 12 of the bill, as printed, these words:

And your orators further show unto your honors, that they claim and insist that if in any manner, by reason of being summoned as executors in said proceedings, or otherwise, the said trustees of said children of said Christopher Colt were or are deemed to have been before said court, in their capacity as trustees for said children, by their failure to urge and defend the rights of said children, under said will and codicils, to said residuary stock, in respect of said gift to said trustees of said five hundred shares of stock, by waiving and by making opposition to said rights of said children as aforesaid, the said trustees have rendered themselves liable to your
47 orators to the same extent as if no such proceedings had been had.

Also by striking out on page 13 of the bill, as printed, these words:

"And further, to the end that in case said executors, in their capacity as trustees for said children, should be found to have been before said courts in said proceedings had in said superior and supreme courts of Connecticut, that upon the ground that they, in said capacity, instead of protecting, opposed the interests of said children under said will, as hereinbefore stated and charged, they may be decreed to pay over to your orators such sum or sums of money as

would, upon accounting, be found equal to the interest of your orators in said stock and accumulations, as hereinbefore claimed."

Hartford, August 29th, 1879.

SIMEON E. BALDWIN,
Solicitor for Plaintiffs.

It is hereby agreed that the within motion may be allowed, and that the bill shall be taken as amended accordingly.

Hartford, Sept 10th, 1879.

CHAS. E. PERKINS,
Solicitor for Defendants.

48 The bill reprinted, *will* [with] all the amendments thereto incorporated in it in their proper place, is in the words and figures following, viz:

49 (Bill reprinted, with all amendments, including those filed Jan. 5th, 1880, incorporated in it, in their proper place.)

United States Circuit Court for the District of Connecticut.

LeBaron B. Colt *et al*
vs.
Elizabeth Hart Colt *et als.* } In Equity.

Bill for an account and to ascertain and establish the rights and interests of the complainants under the will of Samuel Colt, deceased, and for a decree for the conveyance and payment to the complainants of what may be found due and payable to them, and for general relief.

To the Honorable Justices of the United States Circuit Court for the District of Connecticut, humbly complaining, showeth unto your Honors:

LeBaron B. Colt, Samuel P. Colt, and Theodora G. Colt, assignee of the right, title, and interest of her son, Edward D. Colt, deceased, under the will of Samuel Colt, deceased, the said LeBaron B., the said Samuel P., and the said Theodora G. Colt, all of Bristol, in the county of Bristol, in the State of Rhode Island, citizens of said State of Rhode Island, Frank E. DeWolf and Isabella D. W. Colt DeWolf, wife of said Frank E. DeWolf, in right of said Isabella, of said Bristol, in said county of Bristol, and State of Rhode Island, and citizens of said State of Rhode Island,
50 bring this their bill of complaint against Elizabeth Hart Colt, widow of said Samuel Colt, deceased, and executrix of the last will and testament of the said Samuel Colt, deceased, also as trustee under said will for the children of Christopher Colt, deceased, and guardian of Caldwell Hart Colt, a minor, under the age of twenty-one years, the said Caldwell Hart Colt being a legatee under said will and claiming to inherit the interest of his brother, Samuel J. Colt, and his sister, Elizabeth E. Colt, both deceased, legatees under said will; the said Elizabeth Hart Colt also as claim-

ing an interest under said will; Richard D. Hubbard, executor under said will, and as trustee with said Elizabeth Hart Colt, as aforesaid, under said will, also as claiming an interest under said will; Richard W. H. Jarvis, also, executor under said will, and trustee thereunder, with Elizabeth Hart Colt and the said Richard D. Hubbard, as aforesaid, also as claiming an interest under said will, also as administrator on the estate of Henrietta J. Colt, deceased; Caldwell Hart Colt, minor, and Samuel Caldwell Colt, claiming an interest under said will; all said respondents, above mentioned, being of Hartford, in said State of Connecticut, and citizens of said State of Connecticut; Matilda C. Root, of said Hartford, and a citizen of said State of Connecticut, and Harris Colt, of the city, county, and State of New York, and a citizen of said State of New York, surviving executors of the last will and testament of Elisha K. Root, late of said Hartford, deceased; George D. Sergeant, of said city of New York, and a citizen of said State of New York, and Lois F. Sergeant, of said Hartford, and a citizen of said State of Connecticut, executors of the last will and testament of Luther P. Sergeant, deceased—the said Elisha K. Root and the said Luther P. Sergeant, named as legatees under said will of said Samuel Colt; and against Miss Alice B. Colt and Norman Colt, of Redwood city, in the State of California, both citizens of the State of California, and James Colt, of the city of St. Louis, in the State of Missouri, a citizen of the State of Missouri, they being the only children
51 and heirs-at-law of James B. Colt, late of Wethersfield, in the State of Connecticut, deceased, and Hugh Harbison, of the city of Hartford, and State of Connecticut, a citizen of said State of Connecticut, as he is administrator of the estate of James B. Colt, deceased.

And thereupon your orators complain and say that heretofore, to wit, on the 6th day of June, A. D. 1856, said Samuel Colt, of said Hartford, then in life, made and published his last will and testament, as of that date, duly executed, to pass real and personal estate, a copy of which will, as originally executed and published, is hereunto annexed, marked "A," being part of Exhibit E.

That afterwards, to wit, on the 12th day of January, A. D. 1858, the said Samuel Colt, then in life, made and published a certain codicil of that date to said will, which codicil was duly executed, to pass real and personal estate, a copy of which codicil, as originally executed and published, is hereunto annexed, marked "B," being part of Exhibit E.

That afterwards, to wit, on the 2d day of February, A. D. 1859, the said Samuel Colt, then in life, made and published a certain additional codicil, of that date, to said will, which last-named codicil was also duly executed, to pass real and personal estate, a copy of which is hereunto annexed, marked "C," being part of Exhibit E, and in and by which said last codicil the said testator confirmed and established said original will, as altered and changed and modified by said two codicils, as and for the last will and testament of

said Samuel Colt, which said copies of said last will and testament and of said codicils hereunto annexed, the complainants pray may be taken as a part of this their bill.

And your orators further represent unto your honors that, in and by said will and codicils, the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis were appointed executors and trustees for the performance and execution of certain trusts
52 contained in said will and codicils; that thereafter, on the 10th day of January, A. D. 1862, the said Samuel Colt deceased.

That thereafter, on or about the 5th day of February, A. D. 1862, said will and codicils were duly proved and approved in the probate court for the district of Hartford, in said State of Connecticut.

And your orators further show unto your honors that the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis did then and there accept said appointment, and took upon themselves the offices of executors for the purposes named in said will and codicils, and then and there gave bonds, as required by law, and otherwise qualified themselves for the faithful performance of the trusts appertaining to said office of executors and contained in said will and codicils, and thereupon took possession of the property and estate mentioned in said will and codicils, and commenced their duties, and continued to act as joint executors thereunder, and still continue so to act.

And your orators further show unto your honors that, under and by the terms of said will and codicils, it appertained to the said LeBaron B. Colt, Samuel P. Colt, Edward D. Colt, Isabella D. W. Colt DeWolf, children of Christopher Colt, deceased, brother of the said Somuel Colt, to have and take, under said will, as set forth in the following clauses, namely:

"To the children of my late brother, Christopher Colt, I give and bequeath as follows: To Isabella DeWolf Colt, an annuity of seven hundred and fifty dollars per year, until she shall arrive at the age of twenty-one years, to be appropriated to her support, maintenance, and education, and when she shall have arrived at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of the stock of said Colt's Patent Fire Arms Manufacturing Company. To each of the other
53 children of my said brother, Christopher Colt, I give and bequeath an annuity of five hundred dollars a year, until they shall respectively arrive at the age of twenty-one years, for their support, education, and maintenance, and to each of said children last named, as they shall respectively arrive at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and, also, one hundred shares of stock in Colt's Patent Fire Arms Manufacturing Company. To have and to hold to them and their representatives and assigns forever."

The provisions of said clause, so far as they applied to one George

D. W. Colt, eldest son of the said Christopher, were subsequently, by codicils to said will, revoked and cancelled, as hereinafter set forth.

And your orators further show that in and by said will it was also provided, as set forth in the following clause, namely:

"I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Fire Arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof, to be applied to the education of his said issue, so far as the sum may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate."

The said children of said Christopher Colt, except said eldest son, George D. W., were substituted for the children of said James B. Colt under said clause, by codicil to said will, as hereafter set forth.

And your orators further show unto your honors that the matter herein in controversy by this bill exceeds the sum and value of five hundred dollars.

And your orators further show unto your honors that, by the said codicil to said will, a copy of which is hereunto annexed, marked "C," it was further provided as follows, namely:

54 "I hereby give and bequeath to each of the children of James B. Colt, a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them.

"I give to the eldest son of my brother, Christopher Colt, a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to wit, five hundred shares of the stock of the Colt's Patent Fire Arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt; to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner, and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt; and I hereby confirm and establish said original will as altered, changed, and modified by this and the previous codicil, as and for my last will and testament."

And your orators further showeth unto your honors, that in and by said original will, it was provided as follows, namely:

"All the rest and residue of my estate, of every kind and description not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire Arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock in the ratio and proportions in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in
55 gross in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies and in precisely the same ratable proportions."

And your orators further show that said Theodora G. Colt is the widow of said Christopher Colt, and the mother of said LeBaron B. Colt, Samuel P. Colt, and Isabella DeW. Colt DeWolf, and also of Edward D. Colt, deceased, and on the sixth day of June, 1870, acquired by purchase and due assignment from LeBaron B. Colt, the administrator of the estate of said Edward D. Colt, all the right, title, and interest of said estate, in the residuary estate and stock and the accumulations thereon, formerly belonging to the estate of Samuel Colt, late of said Hartford, deceased, which is hereinafter particularly mentioned, as more fully appears by said assignment to her, ready in court to be shown.

And your orators further show that at the decease of said Samuel Colt he owned many more shares of stock in said Colt's Patent Fire Arms Manufacturing Company, to wit, fifty-three hundred and forty-six (5,346) shares or more, which passed under the residuary clause of said will, which additional shares of stock were not needed or used for payments of debts or charges against his estate, but properly passed under said residuary clause of his will.

And your orators further show unto your honors, and aver the fact to be, that up to the time of filing this their bill the said children of the said Christopher Colt have only received from the the estate of the said Samuel Colt, under said will, said one
56 hundred shares each of said stock legacies given to them under said will; four hundred and sixty shares of the residuary stock in respect of said legacies of one hundred shares each, and the accumulations thereon; said twenty-five hundred dollars gross legacies to each, and the residum thereon; and said five hundred shares of said stock and dividends thereon given in trust for them as aforesaid; said last five hundred shares of stock so held in trust with the accumulations thereon, having been paid over to the said children of the said Christopher on the 11th day of January, A. D. 1873, excepting such portions of said accumulations as may

have been included in certain payments made by said trustees out of the accumulations upon the stock held by them in trust, to some of your orators for the purpose of their education, according to the provisions of the trust under said will and codicils, from time to time, during their minority.

Whereas your orators claim that, in addition to what said children of the said Christopher have already received, as above stated, they are and were, under the provisions in their behalf contained in said will and codicils, entitled to a much larger number of the shares of said stock, to wit:

To five hundred and seventy-four and twenty-six thirty-firsts ($574\frac{26}{31}$) additional shares, and more, together with the dividends and accumulations thereon.

And your orators further show unto your honors, that said children of said Christopher are entitled to such additional stock and accumulations thereon, in the manner and for the reasons hereinafter set forth, namely:

First.

Because they submit and claim that in respect of said legacies of stock of one hundred shares each to said children of Christopher Colt, under a true and just construction of said will and codicils, they were entitled each to a larger share of said residuary stock, to wit:

57 ——— shares additional to what they have already received as above stated, and accumulations thereon.

Second.

Because they submit and claim that said gift to said trustees, under said will and codicil, of five hundred shares of said stock, in trust for the children of said Christopher Colt, in place of the children of said James B. Colt, carried to said trustees and entitled the said children of the said Christopher, to wit, the said LeBaron B., Samuel P., Edward D., and Isabella, under said residuary clause of said will, above set forth, to have and receive such proportion of the said stock named in and bequeathed by said residuary clause, as said five hundred shares bears to the whole amount of the other legacies of stock given in said will and codicils, and the dividends declared and accrued thereon since the decease of the said testator.

Third.

Because they submit and claim that said children of said Christopher are also entitled under said residuary clause of said will to such proportion of the five hundred and seventy-four and twenty-six thirty-firsts ($574\frac{26}{31}$) shares of residuary stock, in which the said James B. Colt, recently deceased, on the 28th day of October A. D. 1878, claimed a life estate (now in the hands of said executors) as said gift of five hundred shares of stock in trust and said legacies of one hundred shares each of said stock to said children (making

900 shares in all) bears to the whole amount of legacies of stock given in said will.

Fourth.

And your orators further show that said James B. Colt died on the twenty-eighth day of October, 1878, and that there now remains in the hands of said executors and trustees named in said will $574\frac{6}{7}$ shares of the stock of said company, the income
58 of which has been by them paid to said James B. Colt during his life, and that said stock now remains for distribution among those properly entitled thereto under the residuary provisions of said will; and that forasmuch as your orators have hitherto received less than their due and lawful proportion of the residuary stock left by said Samuel Colt, and of the accumulations thereon, your orators are now equitably entitled to demand and receive from said executors and trustees named in said will the whole of said $574\frac{6}{7}$ shares of stock, in order to aid in making them equal with said other residuary legatees and in carrying out the provisions of said will and codicils.

And so far as any of said residuary stock and the accumulations thereon, rightfully appertaining to them or to their said trustees in trust for them, have been (according to the statement contained on page 65 of the annexed printed Exhibit "E" or otherwise) by said executors and trustees transferred to themselves personally, and distributed and transferred to other parties (who or whose legal representatives are made defendants herein), your orators submit that the equities between said parties defendant and your orators in the premises should now be adjusted by the court, so as to make good and restore to your orators the amount of stock rightfully belonging to them under said will and codicils and the accumulations thereon.

And your orators further represent that, at the time of the decease of the said Samuel Colt, to wit, on the 10th day of January, A. D. 1862, the said Edward D. Colt, the said LeBaron B. Colt, and the said Samuel P. Colt, children of the said Christopher Colt, were infants under the age of twenty-one years. And said children, except the said Edward D., continued to be infants, under the age of twenty-one years, until long after the probate of said will and the termination of proceedings had in the superior court and supreme court of errors of said State of Connecticut with reference to
59 said will and codicils hereinafter referred to; and that the rights of said children under said will and codicils could only be lawfully asserted and maintained by a guardian *ad litem* in the matter of their claims to residuary stock in respect of said legacy of one hundred shares each, and by said executors, in their capacity as trustees, in the matter of said children's claim to residuary stock in respect of said five hundred shares given to said executors in trust.

And your orators aver the fact to be that said children were not, in said proceedings, or in any proceedings, with reference to their

claims to residuary stock, in respect of said legacies of one hundred shares each, represented at any time by any guardian *ad litem*, or by any one in any capacity; and in respect to their rights to residuary stock under said gift to said trustees for them of said five hundred shares of stock, in the place of the rights of said children being asserted and maintained by said trustees, your orators are quite recently informed and advised, to wit, on the twenty-seventh day of December, A. D. 1878, that said executors not only did not appear and urge the claim of said children in respect of said residuary stock under said gift of five hundred shares of stock, but waived the same, and by counsel and by written brief, a copy of which is hereto annexed, marked "D," and made part hereof, opposed the claims of said children, in respect of said residuary stock, under said legacy of five hundred shares in trust, so that, in fact, as your orators aver, the claims of said children, under said will, were at no time legally made, set up, heard, or passed upon in any of the proceedings with reference to said will and codicils.

And now your orators further represent that they are advised, and believe it to be true, that had said children been represented in the proceedings aforesaid had in reference to said will and codicils, and their claims presented and urged in respect to said
60 legacies, to them directly, of said one hundred shares each, and in respect of said legacy of five hundred shares in trust, said additional shares of stock accumulations thereon, as hereinbefore claimed, would have been delivered and paid over to them.

And your orators had well hoped that no controversies would have arisen between your orators and the said respondents with reference to the claims of your orators under said will and codicils, as hereinbefore set forth, and that the said stock and accumulations thereon would have been delivered and paid over to your orators under said will and codicils, as hereinbefore claimed, as in equity and good conscience your orators submit should have been done; but your orators aver that the said respondents, the said Elizabeth H. Colt, the said Hubbard, and the said Richard W. H. Jarvis, executors and trustees under said will, though requested, refuse to comply with the reasonable requests of your orators in this behalf made, at times, pretending that said children of said Christopher are not entitled, by reason of said legacy of five hundred shares of said stock given to said trustees in trust for them as aforesaid, in place of the issue of said James B. Colt, to any share, either in the residuary stock originally in the hands of said executors to be distributed under the residuary clause of said will, or to any share in said five hundred and seventy-five shares of said residuary stock now come into the hands of said executors, upon the decease of said James B. Colt, in which the said James B. Colt claimed and has enjoyed a life estate, nor to any additional residuary stock and dividends originally in the hands of said executors in respect of said legacies of one hundred shares each to the said children of said Christopher Colt, as hereinbefore set forth and claimed, and in support of such pretenses allege

said certain proceedings hereinbefore referred to, had in the superior court and the supreme court of errors of the said State of Connecticut, which it is pretended affect the rights of your ora-
61 tors under said will and codicils, a copy of which said proceedings are hereunto annexed, marked " E," and made part of the complainants' bill.

Whereas your orators aver and maintain that, notwithstanding said proceedings, the complainants, in truth and in fact, are entitled to such additional shares in said residuary stock and accumulations thereon as herein set forth, and are not barred from claiming and receiving said additional residuary stocks and accumulations thereon because of said proceedings of said courts, and for the reasons following, that is to say:

First.

Your orators aver that at the time when said proceedings were instituted, the said Edward D. Colt, the said LeBaron B. and the said Samuel P. Colt were minors under the age of twenty-one years, the said Edward D. arriving at his majority pending said proceedings, to wit, on the 28th day of May, 1865, the said LeBaron B. and the said Samuel P. continuing to be minors until after the termination of said proceedings, the said LeBaron B. arriving at his majority on the 25th day of June, A. D. 1867, and the said Samuel P. on the 10th day of January, A. D. 1873, and that neither of said minor children were represented in said proceedings at any stage thereof, from the commencement to the end, by a guardian *ad litem*. The only guardian of said children pending said proceedings was a general guardian of the persons and estates of said children, to wit, their mother, the said Theodora G. Colt, appointed by said probate court for the district of Hartford; and your orators submit that the said Theodora G. Colt, general guardian of said children, had no power or authority to represent them in said proceedings upon the questions of their rights, interest, and claims under said will and codicils, especially in respect of said legacies of one hundred shares each to said children, or in any other respect, and did not, in fact, at any time appear in said proceedings.

62 Second.

Because the questions affecting the rights and interests of said children of Christopher Colt, in respect of said legacy of five hundred shares given to said executors in trust for them, could not be considered or passed upon in said proceedings, or in any proceedings, until the youngest of said minor children, to wit, the said Samuel P. Colt, arrived at the age of twenty-one years.

Third.

Because the said Elizabeth Hart Colt and Richard D. Hubbard and Richard W. H. Jarvis, trustees, as aforesaid, under said will and codicils of the said children of Christopher Colt, were not sum-

moned to appear in said proceedings in their capacity as said trustees, and, as your orators aver, entered no appearance in said proceedings, in their capacity as said trustees, in behalf of said children, and employed no counsel to appear before said courts in their behalf as trustees for said children, and in defence and maintenance of the rights of said children under said residuary clause in said will, in respect of said gift of five hundred shares of said stock to said trustees as aforesaid; and no issues were made up or caused to be made up by said trustees before said courts in said proceedings, involving the rights and interests of said children, under said will and codicil to said residuary stock in respect of said gift to said trustees, as hereinbefore claimed.

Fourth.

Because, if said Colt, Hubbard, and Jarvis, summoned to appear in said proceedings as executors under said will, were deemed and adjudged to be, for that reason or any other, before said courts in their capacity as trustees for said children, then your orators aver and insist that said proceedings cannot be held in any manner to affect or impair the rights of said children under said will
63 and codicils, because, as your orators aver the fact to be that said executors, in their capacity as trustees for said children, not only did not appear for and in behalf of said children upon the questions of their rights under said trust to said residuary stock, and urge the same upon the attention of said courts before which said proceedings were pending, but, as your orators aver the fact to be, said trustees, by their counsel, to wit, Origen S. Seymour and W. W. McFarland, Esquires, appeared before said courts, and by brief, hereinbefore referred to, and argument of counsel, actively opposed the claim of said children to said residuary stock in respect of said gift of five hundred shares in trust.

Fifth.

And your orators further aver, as a fifth reason as aforesaid, that said Theodora G. Colt, at the time of and during the pendency of said proceedings by James B. Colt, in said superior court and said supreme court of errors, was unacquainted with legal business and formalities, and owing thereto did not apprehend it to be her duty as guardian of said minor children to appear in response to said citation annexed to his said bill in the superior court in their behalf, or as such guardian, and did not in fact employ counsel to appear, or herself appear, in any way to defend against said bill, or to answer thereunto, or to become a party to the same in either of said courts; and also that the said Isabella DeW. Colt DeWolf was, at the time of said proceedings by and on said bill, also unacquainted with legal business, and owing thereto employed no counsel to appear for her or to defend her interest, and supposed, as did also her said husband, until on or about the first day of January, 1879, that said executors had advocated her claims in her behalf as hereinafter

set forth, and had endeavored to present them properly to said superior court and said supreme court of errors in her behalf.

64 And your orators further say that all debts and charges due from said estate of Samuel Colt have been paid and satisfied; and that after the said decrees of said supreme court of errors and said superior court, to wit, on the second day of July, 1866, said executors rendered an administration account to said probate court, wherein they credited to themselves, under date of June 18, 1866, as follows:

"By trust fund 500 shares of stock, set aside to trustees for Christopher Colt's children, $100,000."

And also credited themselves as follows:

"By stock held for James B. Colt, life interest, $574\frac{26}{31}$ shares.
"By stock held for LeBaron B. Colt, $214\frac{30}{31}$ shares.
"By stock held for S. Pomroy Colt, $214\frac{30}{31}$ shares."

And also with sundry investments made on account of "trust fund," including therein the following credit, to wit:

"Mrs. Theodora Colt, guardian, for the education of her three sons, viz.:

"Edward D. Colt	$1,705 00
"LeBaron Colt	2,425 00
"S. Pomroy Colt	1,375 00
	$5,505 00"

And also on January 20, 1873, said executors and trustees made a furthar return to said probate court, wherein they charge themselves, among other things, as follows:

"There remains undisposed of, for the benefit of whomsoever may be entitled thereto, the remainder in the five hundred and seventy-four $\frac{26}{31}$ shares bequeathed to James B. Colt for life.

All of which fully appears by the records of said probate court, a certified copy whereof, your orators have ready in court to be shown.

And so your orators complain and say unto your honors that said Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H.

65 Jarvis, executors, on and after the probate of said will as aforesaid, took upon themselves the execution of all the trusts therein contained, including those in favor of your orators, and from time to time thereafter assented to and assumed to act as trustees under said bequests to them in trust for your orators, and have ever since continued to act as such trustees, and are accountable as such unto your orators touching all the matters and things pertaining to said trust as created by said will; and, as your orators are advised, now hold in their hands in trust for your orators said five hundred and seventy-four $\frac{26}{31}$ shares of said stock in which said James B. Colt formerly claimed a life estate.

And the said respondents, Elizabeth H. Colt, Richard D. Hubbard, and R. W. H. Jarvis, sometimes further pretend that on or about the 11th day of January, 1873, on the strength of having transferred and paid over to your orators 500 shares of the said stock, bequeathed in said will to them as trustees for your orators, and the accumulations thereon, they obtained from each of your orators a certain written instrument, claimed to have been signed by your orators, to and in favor of said respondents, as trustees as aforesaid, the same purporting in each case to be a receipt to said respondents, as trustees under said will, for the proportional share to which each of your orators was entitled in 500 shares of the said stock, bequeathed in said will to said trustees in trust for your orators, and the accumulations thereof, and releasing and discharging said respondents, trustees as aforesaid, from all further accountings, actions or causes of actions for or on account of said trust thereof.

And further pretend that, on the strength of having paid over and transferred to your orators, the property, money and estate, coming to your orators from them as executors under the legacies, annuities, and devises to your orators given by said will, they, at the time aforesaid, as executors, also obtained from your orators a certain other written instrument, which they claim to
66 have been executed by your orators, to and in favor of said respondents as executors, acknowledging the receipt from them, as executors, of the sum of $2,975.24, as the proportional interest and share of your orators in the balance, then in the hands of said executors, and also acknowledging the receipt of the said various other sums, legacies, annuities, devises, and distributions coming to your orators from said respondents, as executors under said will and under any previous settlements and administrations between said respondents, as executors, and your orators, and in consideration thereof releasing and discharging the said respondents, as executors as aforesaid, from all further accountings, actions, and causes of action therefor excepting as to the question of their interest in the remainder of the said $574\frac{2}{3}\frac{6}{1}$ shares of said stock, claimed as aforesaid to have been bequeathed in said will to said James B. Colt for life.

And said respondents further claim and pretend (but how and upon what theory, your orators cannot well understand) that said instruments obtained by them as aforesaid in some way release and discharge the said just claims, rights, and interest of your orators in and to the share and proportion of said residuary stock, to them, and to their trustees, belonging under the provisions of said will and codicils, and the accumulations thereof.

Whereas your orators charge the contrary of such pretenses to be true, and that the payments and transfers of stock aforesaid were not a full settlement and satisfaction with and to your orators of and for the amounts of stock and the accumulations thereon, to which your orators and their said trustees are and were entitled under said will.

And your orators further charge and aver, in relation to the al-

leged instruments aforesaid, that the same, if any there were, were made under the circumstances following, to wit:

67 That in the month of April, 1866, your said orators removed from the State of Connecticut to Bristol, in the State of Rhode Island, and have never since been residents of the State of Connecticut.

That on the 10th day of January, 1873, (the youngest of your said orators, the said Samuel P. Colt, attaining his majority on that day,) your orators, the said Frank E. DeWolf, LeBaron B. Colt, and Samuel P. Colt, arrived at the city of Hartford, Connecticut, from distant parts of the country, viz.: The said Frank E. DeWolf, from San Francisco, California; the said LeBaron B. Colt, from Chicago, Illinois; and the said Samuel P. Colt, from Boston, Massachusetts. That upon the 11th day of January, 1873, your said orators, the said Frank E. DeWolf, LeBaron B. Colt and Samuel P. Colt went to Colt's Armory in said Hartford, and there met the said respondents, the said Richard D. Hubbard and R. W. H. Jarvis.

That thereupon certain instruments were drawn either by or at the dictation of the said respondents, the said Hubbard and Jarvis, and the respondents, as trustees, paid over to your orators the said 500 shares of stock and the balance of the accumulations thereon, heretofore mentioned, and as executors paid over to your orators the sum of $2,975.24, represented by them to be the balance in their hands, as executors, belonging to your orators.

And your orators aver that the said respondents, the said Hubbard and Jarvis, made no explanations to your orators of the rights of your orators under said will and codicils, nor that your orators had any further rights thereunder, other than to receive the amounts aforesaid.

And your orators aver that they had no previous notice of or previous knowledge that said respondents would ask at said time for any receipts or instruments to be made by your orators; that said instruments were made without deliberation and without time

68 or opportunity therefor on the part of your orators, and without full and competent knowledge on the part of your orators of their claims, rights, and interests under said will and codicils, and in ignorance of the course pursued by said respondents in the said proceedings, in the courts of Connecticut, in filing a brief in opposition to their own rights, interests, and claims under said will and codicils, to them belonging and appertaining, as trustees of your orators, and in opposition to the rights, interests, and claims of your orators as their *cestuis que trust*, and in ignorance of the manner in which the said judgment and decree had been obtained.

And your orators further aver that they had and reposed great confidence in said respondents, the said Hubbard and Jarvis, in the matter of their said rights and interests in the premises, especially in view of the fact that they stood in fiduciary relations to your ora-

tors, and were in duty bound to protect the rights of your orators, and your orators had always been accustomed to repose such confidence in them, the said Hubbard and Jarvis, and were inclined to easily and readily comply with any request or direction from them in relation to the making of any instruments of receipt which said respondents, the said Hubbard and Jarvis, might indicate as being necessary and proper, and that no reference or allusion was made in any way to said residuary stock, nor was it suggested or intimated that said instruments would ever be claimed to be a release or discharge of the rights and interests of your orators, or of their trustees therein, or any part thereof.

And your orators charge and aver that said residuary stock, or their proportion thereof, or their or their trustees' interest and right therein, did not, as a matter of fact, in any way enter into or form a part of the transaction, and were not included in or covered by said pretended instruments, or either of them, but that the said alleged first-mentioned instrument (if any there
69 be) purported to relate to, and did relate only to the amount of 500 shares of stock and the accumulations thereon, referred to therein, and the trust is to said amount of said stock, and was not intended to, and ought not to be, and your orators submit cannot be held to extend further than that, in its effect, or to release their claim and right to anything more or further; and that the other of said alleged instruments (if any such there be) related only to the property, estate, and money coming to your orators from the said respondents, the said Elizabeth H. Colt, Richard D. Hubbard, and R. W. H. Jarvis, strictly as executors, for and on account of the legacies, annuities, and devises in and by said will given directly to your orators, and not to any stock or property whatever, therein bequeathed to them as trustees of your orators; and said receipt was not by any of said parties understood as referring to any property given by said will in trust, or your orators' rights thereto.

And your orators further charge and aver that said alleged instruments (if any such there be) cover only the amounts of stock, property, and money, actually transferred and paid over by the said respondents as aforesaid, and were without any other or further consideration therefor, and do not operate as a release or discharge of or for anything other or further than said amounts.

And the said respondents, the said Elizabeth H. Colt, Richard D. Hubbard, and R. W. H. Jarvis, sometimes also pretend that, as executors as aforesaid, they have from time to time filed in the court of probate for the district of Hartford, Connecticut, their certain accounts relative to said estate of said Samuel Colt, and the settlement thereof, and that the same were passed upon by said court of probate, and duly accepted and approved; and the said respondents claim that the same in some manner or form, are a bar to the prosecution of the rightful claims of your orators hereinbefore set forth.

But your orators charge and aver the contrary, and aver

70 that your said orators, having removed from the said State of Connecticut, as hereinbefore set forth, were not at the time of filsng of the said accounts residents of said State, and that they received no actual or sufficient notice of the filing of said accounts or of any proposed action thereon, and that your orators, or some of them, were minors at the time of the alleged filing thereof, except at the time of the alleged filing of the last of said accounts, and that at said last-mentioned time the youngest of your orators had just attained his majority on the day of the alleged filing thereof, and that the said trustees of your orators were not legally cited or notified to appear, and did not appear, and that the said minors were not in any way legally represented in the proceedings before said court of probate, and were not present, and were not bound thereby.

And your orators charge and aver that in any event, whatever may have been the proceedings in said court of probate, and under whatever circumstances the same may have taken place, they are not, and cannot be, a bar to the prosecution of the rights of your orators hereinbefore set forth.

Wherefore, as not to comply with the reasonable demands of your orators as hereinbefore set forth, tends to the manifest wrong and injury of your orators, and inasmuch as your orators are without remedy in the premises in accordance with the strict rules of the common law, and can only have relief in a court of equity where such matters are recognizable.

To the end, therefore, that said respondents may full, true, and perfect answer make to the matters herein stated and charged, and that as fully as if hereafter particularly interrogated, and that said stock claimed by your orators under said will and codicils, and the accumulations thereon may be delivered and paid over to your orators by said executors and trustees, and that they may be decreed to render a full, true, and just account of their doings, with
71 reference to the residuary stock and accumulations thereon, coming into their hands as executors and trustees as aforesaid, and especially with reference to the residuary stock and the accumulations thereon in respect of and appertaining to said gift of five hundred shares of stock to them in trust for said children, and that your orators may have such other and further relief as to your honors shall seem meet. May it please your honors to grant unto your orators the writ of subpœna *respondendum* issuing out of and under the seal of the honorable court directed to the said respondents, commanding them to appear at a day fixed before this honorable court, then and there to answer the premises and to perform and abide by such order and decrees herein as to this honorable court

may seem required by the principles of equity and good conscience, and your orators will ever pray.

LEBARON B. COLT.
SAM'L P. COLT.
FRANK E. DEWOLF AND
ISABELLA DEW. C. DEWOLF,
By their Attorney, Sam'l P. Colt.
THEODORA G. COLT,
By her Attorney, LeBaron B. Colt.

SIMEON E. BALDWIN,
Solicitor and of Counsel.

72 UNITED STATES OF AMERICA, }
District of Connecticut, } *ss:*

I hereby certify that LeBaron B. Colt and Samuel P. Colt, both being duly cautioned and sworn, on the third day of January A. D. 1879, deposed and said that they were the complainants in the foregoing bill named, and had read the same, and that the said bill was true except as to those matters stated to be on information and belief, and that as to those they verily believed it to be true.

In witness whereof, I have hereunto set my hand and affixed my official seal, this fourth day of January, A. D. 1879.

[L. S.] WM. K. TOWNSEND,
Notary Public.

A. & A. D. PAYNE,
COLWELL & COLT,
Counsel, Providence.

73 EXHIBIT D.

Supreme Court of Errors. February Term, 1866.

JAMES B. COLT
vs.
ELIZABETH H. COLT and other executors.

Brief for Defendants' Counsel.

I.

We submit that the petitioner, James B. Colt, takes only a life estate in the stock to which he may be entitled under the residuary clause in the testator's will.

1. It is a general rule that when the amount of a legacy is increased, or when one legacy is substituted for another, in the absence of any provision to the contrary, the legatee will take the same estate in the additional or substituted bequest, and upon the same terms and subject to the same incidents as the original bequest.

Roper on Legacies, pp. 872, 873.
2 Leading Cases in Eq., 549.

Where the first gift is given absolutely to the party, or is made defeasible, the second gift has been held to be given upon similar [—]. For example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the
74 same incidents. So if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition.

Per Sir W. Page Wood, V. C. 1, Kay 128.
1 Lead. Ca. in Eq., 626.

If, after a legacy is given to a married woman to her separate use, an additional legacy is given to her by a codicil, she will take that also to her separate use.

Day *vs.* Croft, 4 Bev., 561.

In Briston *vs.* Briston, 5 Bevan, 289, the application of the rule defeated the legacy. A testatrix in the exercise of a power of appointing five thousand pounds, appointed eight hundred pounds, part of it equally between A and B, and by a codicil revoking that legacy, bequeathed to each one hundred pounds only, but without stating that the last legacies were a part of the five thousand pounds. The power having been decided to be void for remoteness, the legacies given out of it failed, and Lord Langdale, M. R., decided that the legacies of one hundred pounds were intended to be given out of the same sum as the eight hundred pounds, and consequently they also failed.

In Learcroft *vs.* Maynard, 1 Vesey, Jr., 279, the testator directed his legacies to be paid out of his real estate. Some of them were given to charities, which were void by the statutes of mortmain, but the testator, by a codicil, revoked those bequests to the charities, and he gave smaller legacies to the charities instead of those mentioned in the will. It was contended for the charities that the gift of the legacies by codicil being general, they were payable out of the personalty, and therefore good. But Lord Thurlow was of the opinion that the codicil only meant to alter the amount of the legacies, but not to change the fund out of which they were to be paid, and therefore that the charity legacies were void, as payable out of real estate.

In Wordsworth *vs.* Younger, 3 Vesey, 73, the testator, Henry Littledale, by his will bequeathed to his sister, Catharine Littledale, three thousand pounds, to be paid to her at the end of two years after the death of the survivor of his two daughters, Annie and Catharine. By a codicil made the next day the testator stated that he had found that his estate would not bear the payment of three thousand pounds during the life of his mother-
75 in-law, as it was chargeable with the payment of one hundred and twenty pounds to her during life, and therefore he revoked that part of his will, and provided that in case his two children should happen to die under age, unmarried and without

issue, then the said three thousand pounds is to be paid twelve months next after the death of my mother-in-law, and not before. It was held that the legacy given by the codicil was not payable until two years after the decease of the daughter, and not twelve months after the death of his mother-in-law, unless the first mentioned period had elapsed, although no mention of this period of time was made in the codicil.

In Crowder *vs.* Crowder, 2 Vesey, 449, the testator gave to his niece one thousand pounds, payable at his death, in the event of her being then unmarried, but if not, she was to receive the interest for life, or until her marriage, but if she died unmarried the legacy was to lapse. By a codicil the testator gave his niece two hundred pounds in addition to what he had given to her by the will. The master of the rolls decided, upon the authority of Learcroft *vs.* Maynard, that the additional legacy should be paid out of the same fund, and be liable to the same conditions, as the original bequest of one thousand pounds.

By the marriage settlement, in Long *vs.* Long, 3 Vesey, 286, the portions provided for the younger children were made payable at twenty-one or marriage, with immediate interest for maintenance at 2 lb. per cent. The father, by will, increased the fortune of each child, directing the additional sums to be paid at the same time and ages as the portions by settlement, but said nothing as to the interest. It was determined that the same rate of interest was payable on the additional portions as upon the original. Many more cases might be cited, but the foregoing authorities abundantly establish the general rule that substituted and additional legacies are attended with the same incidents as the original legacies.

2. It is, we submit, perfectly clear that the stock bequeathed in the residuary clause of the will to the before-mentioned legatees of stock, in proportion to their original legacies, is, in the sense of the foregoing rule, in addition to and increase of their respective original bequests.

The testator says, in effect, I bequeath to A, B, and C,
76 each, so many shares of stock, and if any remains it is to be shared between them in proportion to their original legacies.

The office of the codicil in this particular is merely to add to each of the original bequests of stock a proportionate number of residuary shares, in case there should be any, and not to bequeath independent legacies having no reference to or connection with the original legacies. If, then, as we contend, the plain and obvious construction of this will is that the residuary shares bequeathed to the several legatees of stock were bequeathed to them in addition to their several original legacies of stock by the terms of the rule we have stated, if we had no other index to the testator's intention, the petitioner would take but a life estate in the stock to which this court has decided he is entitled under the residuary clause, inasmuch as he would have taken but a life estate in the original legacy of stock if that legacy had not been revoked. We presume it will

not be contended that the estate which the petitioner takes under the residuary clause enlarged by force of the revocation of the original legacy, or that the legal effect of revoking the bequest of an estate in remainder in this stock to the children of the petitioner was to give to him the estate taken from his children. It certainly was not the intention of the testator by revoking a bequest to the petitioner's children to make a bequest to the petitioner.

3. But, independent of any general rule on this subject, and considering the question as one depending upon the interpretation of the language employed by the testator in this will, the construction must be the same.

The language of the original bequest is as follows: "To my brother, James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement, during his life, of five hundred shares of stock of said Colt's Patent Fire Arms Manufacturing Company, and after the death of my said brother, to his issue lawfully begotten, as an absolute estate."

It is very evident that here are two legatees of this stock, and separate estates given to each. J. B. Colt is a legatee, and his children are also legatees. To one is given a life estate in the stock; to the other the fee in remainder. Now, in the residuary clause, the testator says: "All the remaining stock of said Colt's Patent
77 Fire Arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies and stock are hereinbefore given; meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specific legacies in stock in precisely the same ratable proportions."

When this clause was penned the petitioner was a legatee, and his children were also legatees, the one having the life estate, the other the remainder. The testator has declared it to be his meaning that all the legatees shall share in the residuary stock in precisely the same ratable proportions. They could not do this if J. B. Colt took an estate in fee in the residuary shares, for then there would be no residuary interest left for his children. It cannot be pretended that the petitioner had any better title to share in the residuum in respect to his life estate in five hundred shares, than his children had in respect to their remainder in the same shares. Nor can it be maintained that these five hundred shares were to be measured into the residuum twice, once for the purpose of taking out a proportional number of shares for the petitioner, and again for the purpose of taking out a like number of other shares for his children. This would lead to the most absurd results. There would be no ratable proportion in such a mode of distribution. Then we say that whether the court arrives at the intention of the testator by applying the general rule of construction (which we have referred to and endeavored to sustain) to the provisions of the will, or whether the court, disregarding this rule, seeks to discover the in-

tention of the testator from the language which he has employed to express it, the result must be the same. There is nothing in the will to indicate that the testator intended the petitioner to take a greater estate in the stock, which might be added to the original five hundred shares by the residuary clause, than he was to take in the original bequest.

This court has decided that the revocation of the original bequest by the testator, in the codicils to his will, did not effect the petitioner's right to take as a legatee under the residuary clause. But whilst this revocation did not destroy, it certainly cannot be said to have increased the estate which he takes under the residuary clause.

78 II.

The stock bequeathed to children of the testator who deceased in the testator's life time, including the original bequest and a proportional number of residuary shares, is to be withdrawn from the operation of the will and is to be disposed of as though no will had been made.

These children were legatees.

The testator set apart and appropriated to them a designated share of his stock. They deceased in his lifetime, and no provision was made for such a contingency.

The statute provides that "The estate disposed of by such device or legacy shall be considered and treated as intestate estate."

The language of the statute is very clear. It requires that the testator himself should, in his will, provide for the contingency of the decease, in his lifetime, of any of his children who are legatees or devisees, and if he omits to do so, the law presumes it to be his intention, and therefore declares that the estate thus disposed of shall be withdrawn from the will and considered and treated as intestate estate.

It would seem to be very clear that the only way in which a testator can provide for the contingency of the decease in his lifetime of children who are legatees, as the statute requires, is by referring to that contingency and directing what disposition shall be made of the estate bequeathed to them, in case it happens. This the testator has not done. The will is silent on the subject. The testator, it must be presumed, was satisfied with the disposition which the law would make of the estate. It cannot be maintained that the testator has made a provision for such a contingency by making a residuary bequest, for, in the first place, there is nothing in the fact that the testator has made a bequest of the residuum, from which the court can infer that the testator intended his residuary bequest as a provision for the contingency of the decease of his children, or any of them, in his lifetime. If he had, by such a bequest, intended to avoid intestacy, as to this stock, by providing as the law requires
for such a contingency, it is to be presumed that he would
79 have said so; and inasmuch as he has not said so, it is diffi-

cult to perceive by what rule of interpretation such an intention can be imputed to him. A residuary bequest is usually found in all testaments, and by this bequest the testator intended to dispose, and did dispose, only of the stock which might remain after satisfying all the other legacies of stock, and after the law had withdrawn from the operation of his will, and given to his surviving child the shares which his deceased children would have taken had they survived him.

In the second place, to hold a residuary bequest in itself to be such, a provision for the contingency in question, as the statute requires, would be to nullify entirely the language of the statute and apply the rule of common law to the case, by which a lapsed legacy was held to fall into the residuum and go to the residuary legatee as testate estate.

By this statute, the rule of the common law was abrogated, and a radical change made in the law on the subject. By the common law, if a devisee of real estate deceased in the life-time of a testator, the estate descended to the heir, and did not go the residuary devisee.

Green *vs.* Dennis, 6 Cam., 305.

In the case of personal estate the rule was different. If the legatee deceased in the testator's lifetime, the estate passed to the residuary legatee. Mr. Roper says, the application of the rule tended to defeat the intention of testators, and many cases in which it was applied were "hard cases." (Roper on Legacies, Mass., p. 467.)

Judge Hosmer, in his opinion of Green *vs.* Dennis, supports this statement when he says: "Wills must be construed by the intent of the devisor at the time of making them." Of consequence, when property is given to a person incapable of taking and there is a general devise of the residue, so far as respects the estate specifically devised at the time of the wills being made, there is an intentional disposition, and it was never designed that it should fall into the residuum." The illustration of the judge was taken from the fact in that case, it being the case of a devise to persons incapable of taking. But it is obvious that the same line of reasoning will apply to the case of a devise or bequest to children in being
80 or after-born children. In such a case, there is an "intentional disposition," and the estate appropriated to such children never was designed to fall into the residuum.

For the reason suggested by Mr. Roper, this rule has been changed by statute in England and in most of the United States.

By Statute I, Victoria, it was provided "that when any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator leaving issue, if any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator,

unless a contrary intention shall appear." Laws similar to this have been enacted in Pennsylvania, New York, South Carolina, Virginia, Maryland, Vermont, New Jersey, and Mississippi. The statute of Vermont includes any relative of the testator, and the Pennsylvania statute extends to brothers and sisters, and the children of a deceased brother and sister.

It will be observed that while these statutes changed the rule of the common law, in very important particulars, there is yet room to contend that in case there is no person answering the description in the statute to take, at the decease of the testator, the estate devised or bequeathed would be governed by the rule of the common law.

But, by our statute, just this contingency is provided for, and for the reason that the Legislature considered it more in accordance with the intention of the testator that the estate devised or bequeathed should, in such a case, be "considered and treated as intestate estate," than that it should go to those to whom the testator had expressed no intention to give it.

No distinction is made between real and personal estate; both are placed on the same footing on the very rational presumption that the intention of testator is the same without regard to the nature of the estate, and the statute provides that "*if there be no such issue, at the time of the testator's death, the estate disposed of by such devise or legacy shall be considered and treated intestate estate.*" It does not provide that if there be no such issue, the real estate devised shall go to the heir, and the personal estate bequeathed shall go
81 to the residuary legatee as testate estate, as the petitioner must claim and ask the court to read the statute. On the contrary the Legislature has been careful to preclude any such construction in terms which are perfectly clear and unambiguous. We say, then, that it is clear, beyond any doubt, that, by force of the statute, the stock bequeathed to the children of the testator who deceased in his lifetime, by their deceased has been withdrawn from the operation of the will and is to be treated and disposed of as intestate estate.

We do not deny that a residuary clause may be so drawn as to provide for this contingency as required by the statute, for this is no more than saying that the contingency may as well be provided in the residuary clause as in any other part of the will. But what we say is this: That it cannot be implied from the mere fact that the testator has made a residuary bequest that he intended by that bequest to provide for the contingency specified by the statute, because this would be to nullify entirely the language of the statute. And we say further, that in the case at bar, there is nothing but that mere fact, namely, a residuary bequest in the ordinary and usual form, without the slightest reference to the contingency mentioned in the statute, or the slightest indication of any intention to provide for that contingency.

It must be admitted that the provision for the contingency nec-

essary to prevent intestacy must be such a provision as would prevent the issue of the deceased child from taking. But if this were a contest between the issue of a deceased child and the residuary legatees, it could not with the least plausibility be contended that the residuary legatees were entitled to take and not the issue.

III.

The stock given to the executors was given to them in their official capacity as executors as compensation in part for services in the settlement of the estate. This bequest was annexed to the office of executor, and the stock and percentage goes to those persons and those only who are appointed executors and perform the duties of the office. The testator leaves no doubt as to his intention in this respect. In the last clause of the original will he says: "And to each of said executors, in compensation for services in the
82 execution of this trust, *in addition to the legacy and devise hereinbefore given*, one-fourth of one per cent. of the cash value of my whole estate."

Nothing can be more evident than that the testator intended both these bequests to stand on the same footing and together to constitute the compensation and the only compensation which the executors were to receive for thair official services.

The testator, by the first codicil to his will, revoked the appointment of Henry C. Deming as one of the executors thereof, and in his place appointed his brother-in-law, Mr. Jarvis, but he made no provision for Mr. Jarvis' compensation, because he intended that he should stand exactly in the place of Mr. Deming, and perform the duties and receive the compensation designed for him. The bequest was annexed to the office. Mr. Deming ceased to have any claim to the compensation annexed to the office when he was released from the performance of the duties of the office.

In the next sentence the testator says: "And in case either of the executors of this will shall decline the trust, I appoint my friend, William W. Eaton, to fill such vacancy," but he provides no compensation for Mr. Eaton, although nothing can be more obvious than that the testator intended to prescribe the compensation which his executors were to receive, and the reason why he did not in this case is the same as in the case of Mr. Jarvis. The testator manifestly intended that Mr. Eaton, in case he should be called upon to fill a vacancy, should stand, both in respect to his duties and his compensation, exactly in the place of the executor who declined the trust, and whose place he filled. Perhaps the strongest proof that the bequest of this stock and percentage was intended by the testator to be annexed to the office of executor as a compensation for services in that capacity, next to the testator's own declaration of the fact in the last clause of the original will, is furnished by the bequest to Mrs. Colt, as executrix. After the testator had made the provision which he designed for her as Mrs. Colt, he provides for her compensation as executrix in the same manner that he provides for

the compensation of the other executors—the last bequest not being to her as the wife of the testator, but as the executrix of his will.

Bequests to individuals who are executors are considered
83 *prima facie*, to be given to them in that character and as annexed to the office, and circumstances must be shown to repel the presumption.

Roper on Legacies, Mary, p. 780.
Williamson Ex'ors, 1153.

In the case of Knight *vs.* Gould, 7 Eng. Ch. Rep., 295, the gift was "unto my executors hereinafter named." It was claimed that this was a gift to those individuals personally of whom that happened to be the most convenient description. Lord Brougham says that these words, "hereinafter named," were mere surplusage. He says, indeed, the addition of these "words of reference hereinafter named is mere surplusage, and can in no way affect the question, for had they been left out they must of necessity be understood, as no appointment having before been made, those only could be executors and take in capacity who should be thereinafter named."

No argument, therefore, against the right of Mr. Jarvis to take the compensation provided for an executor, and in favor of the right of Deming to take the compensation, though not an executor, can be predicated on the words "hereinafter named," which the testator employed in referring to his executors.

We contend, however, that the testator has not left his intention on this point ambiguous, to be discovered only by the application of rules framed to discover the intention of a testator in case of ambiguity. He has clearly expressed it.

IV.

The children of Christopher Colt are not entitled to share in the residuum in respect to the legacy of five hundred shares of stock given to them by the codicil to the will.

1. They are clearly excluded by the terms of the residuary clause. The testator says that the residue of stock "shall be divided among the several persons and parties to whom I have hereinbefore given legacies of stock in the ratio and proportion in which said legacies and stock are hereinbefore given."

Now, if no bequest of stock had been made to them in some clause of the will, preceding the residuary clause, we presume no one would contend that they could share in the residum in respect of a legacy given them by a subsequent codicil, because they
84 would not at all answer to the description given by the testator of those who were to share in the residuum.

But the fact that they are previously named as legatees does not affect the question, because they are by terms of the will only to share in the residuum in the ratio and proportion of the legacy thereinbefore given.

Under this residuary clause, therefore, it is clear that they cannot

share in the residuum of stock in respect to a legacy thereinafter given, but only in respect to the legacy thereinbefore given.

On this question Hull *vs.* Severn, 9 Sim., 516, is directly in point.

The testator directed the residue of his estate to be sold, and the proceeds thereof to be divided "unto and amongst all and every my before-mentioned legatees, or such of them as shall be then living, in the proportions that their several personal legacies *are hereinbefore given and bequeathed unto them.*

"The testator, by a subsequent codicil, gave pecuniary legacies to several persons, several of whom were legatees under his will, and amongst them a legacy of two hundred pounds to Henrietta, wife of John Paul Banister, to whom he had given a legacy of one hundred pounds by his will, and he declared that the legacies given in the codicil were *in addition to what he had given to them, or any of them, by his will.*"

It was contended for Mrs. Banister that she was entitled to share in the residue in respect to both the legacy given by the will and the legacy given by the codicil, in proportion to the aggregate given to her by the will and codicil.

The vice-chancellor, Sir L. Shadwell, held that she was not entitled to share in the residue in respect to the legacy given by the codicil, and his reasoning is directly applicable to the case at bar. He says; "The testator, by his will, directs his residuary estate to be divided among his before-mentioned legatees *in proportion to their several legacies thereinbefore given and bequeathed to them.* Consequently the persons who are to take the residue are the legatees named in the will, and the proportions in which they are to take it, *are the proportions which the legacies thereinbefore given to them respectively* bear to the amount of the residue."

2. There is nothing in the terms of the bequest of the
85 shares in the codicil which can be construed to give these legatees a right to share in the residue of stock in respect to this legacy.

The testator says he gives to them the property, to wit, five hundred shares of stock which he had previously bequeathed to his executors, in trust for the children of James B. Colt. This clause is no stronger than if he had simply said that he gave to them five hundred shares of stock.

The fact that the testator states what particular shares they are that he bequeathes to them cannot affect the question. He does not say, either expressly or by implication, that the legatees are to share in the residuum in respect of this legacy.

By the residuary clause he has fixed the proportions in which the respective legatees are to share in the residuum of stock, and the question must be determined by the language there used. The remaining clause of this bequest refers only to the duties of the executors in relation to it. This court has substantially decided this point, for if the transfer to the school of the five hundred shares originally given to the petitioner did not convey with it a

right to share in the residue, how can it be said that the transfer to Christopher's children of the stock originally given to the petitioner's children carries with it a right to share in the residue?

V.

The executors are clearly not chargeable with interest upon the amount of dividends that the court may decide the petitioner is entitled to receive. Interest, as interest—that is, a compensation for the use of money which the law entitles a creditor to receive and requires the debtor to pay, in the absence of a contract to pay it—is only allowed when the fund has drawn interest in the meantime or where there has been an unreasonable detention of it, and the rule is to be applied according to the circumstances of each case.

Jones *vs.* Mallory, 22 Ct., 386.
Lund *vs.* Lund, 41 N. H., 355.
Madden *vs.* Madden, 27 Wis., 544.
Wendel *vs.* French, 19 N. H., 205.
86 Stewart *vs.* Stoker, 13 Serg. & Watts, 199.
Delaware Ins. Co. *vs.* Delamire, 3 Binn., 295.
Prescott *vs.* Parker, 4 Mass., 170.
Oriental Bank *vs.* Tremont Ins. Co., 4 Met., 1.
Domat Civil Law, §1904.
Pothier on Obl.

A stake holder is not liable for interest while the title to the funds is in litigation.

Jones *vs.* Mallory, 22 Ct., 386.
Prescott *vs.* Parker, ante.
Oriental Bank *vs.* Tremont Ins. Co.
Stevens *vs.* Bannigh, 13 Wend., 639.

The executors stand in the situation of stake holders in respect to these dividends, as between the adverse claimants under the will.

When the demand is unliquidated and the amount to be paid cannot be ascertained without litigation, interest is never allowed.

Sedgwick on Dam., marg. p. 377.
McLaughlin *vs.* Wash. Ins. Co., 23 Wend., 525.

"Where the right of a party to recover is doubtful and is contested on reasonable grounds, and the amount due him requires to be adjusted by proceedings in the suit, interest is only recoverable after the right of the party to recover and the amount of his recovery has been determined."

The Isaac Newton, 1 Abb. Adm'r, 588.

"Trustees will be charged with interest only from the date of the master's report when they have acted in good faith in the execution of their trust, but have misapprehended their duties in the par-

ticular respect to which they are charged in the final decree of the court."

Per Nelson, Judge, in Norman *vs.* Shorer.
1 Blatchford C. C., 596.

"An executor will not be charged with interest on a balance in his hands, retained under a fair misapprehension of his right."

Bruere *vs.* Pemberton, 12 Vesey, 386.
Wolfe *vs.* Findlay, 6 Hare, 66.

87 "Interest will not be charged against an executor upon an unascertained residue."

Williams *vs.* Powell, 10 Eng. L. & Equ., 224.

Tried by any of these rules, the executors in the case at bar cannot be held liable for interest on the dividends.

1. They have made no interest, and no one will contend that it was their duty to invest the dividends.

2. It was not known to the executors until within a very recent period (within a year), and since this litigation commenced, that these dividends, or some portion of them, would be needed for the payment of debts.

3. The petitioner's right to any stock was a doubtful and litigated question. The executors were advised by counsel that he had no right, and it would be unreasonable and unjust to impose upon them the responsibility of determining, at their peril, whether the right existed, and the nature and extent of it.

4. The extent of the petitioner's rights is yet to be determined by this court, and it is expressly found, as a fact in the case, that the executors could not safely pay over to the petitioner the sums to which he may be found to be entitled without the specific directions of this court. In a matter of such importance and difficulty the executors are entitled to the protection afforded by a decree of the court, and they cannot justly be considered in default until they are instructed by the court as to their duty in the premises.

For these reasons we submit that the executors should not be charged with interest on the damages to which the petitioners may be entitled.

VI.

As to the decree which should be passed in respect to the stock in which the petitioner has a life estate, we submit:

That certificates for this stock should be issued by the corporation to the *estate* of the testator and delivered to the executors, who should give the petitioner a power of attorney to collect the dividends.

Hill on Trustees, 570.
Johnson, Ex'r, *vs.* Bridgewater Iron Manufacturing Co., 14 Gray, 276.

88 Where the property in which a life estate is given is of such a nature that possession is necessary to its beneficial en-

joyment by the tenant for life, as in the case of movable articles, such as furniture, plate, heirlooms, &c., the tenant for life is entitled to possession.

Hill on Trustees, 569.
Tiffany and Bullard on Trustees.
Hudson *vs.* Woodworth, 8 Ct., 363.
Langworthy *vs.* Chadwick, 13 Ct., 42.

In such a case, if there is real danger of loss, the tenant for life will be required to give security, but not otherwise. (See cases last cited.)

But it is an elementary principle that a bequest of a fund for life is a bequest of the interest only, and the executors must retain the possession and management of the fund, and the same rule applies to a bequest of stock.

Don *vs.* Wainwright, 13 Rep., 328.

It is the duty of the executors to retain the general control of the stock for the benefit of those in remainder.

Hill on Trustees, 570.

In respect to this stock the executors are trustees, and their duties and liabilities the same as trustees in other cases.

Tiffany and Bullard on Tr., 483.

89 EXHIBIT E.

JAMES B. COLT *vs.* MRS. E. H. COLT AND AL.

Superior Court, July Term, 1864.

To the Honorable Superior Court of the State of Connecticut, next to be holden at Hartford, within and for the County of Hartford, in said State, on the third Tuesday of July, A. D. 1864.

The petition of James B. Colt, of St. Louis, in the State of Missouri, respectfully represents:

That heretofore, to wit, on the 6th day of June, A. D. 1856, Samuel Colt, of said Hartford, then in life, made and published his last will and testament of that date, duly executed, to pass real and personal estate, a copy of which will as originally executed is hereunto annexed, marked "A."

That afterwards, to wit, on the 12th day of January, A. D. 1858, the said Samuel Colt, then in life, made and published a certain codicil of that date to said will, which codicil was duly executed to pass real and personal estate, a copy of which codicil as originally executed and published, is hereunto annexed, marked "B."

That afterwards, to wit, on the 2d day of February, A. D. 1859,
90 the said Samuel Colt, then in life, made and published a certain additional codicil of that date, to said will, which last-named codicil was duly executed to pass real and personal estate, a copy of which codicil is also hereunto annexed, marked

"C," and in and by which last codicil the said testator confirmed and established said original will as altered, changed, and modified by said two codicils, as and for the last will and testament of him, the said testator.

That in and by the said will and codicils the said testator disposed of, gave, devised, and bequeathed the said shares of the capital stock of the Colt's Patent Fire Arms Manufacturing Company, and the other property described in said will and codicils, to the various parties, and in the manner and proportion named therein, except so far as the same were in and by said codicils revoked or modified, and especially he therein and thereby bequeathed to the said James B. Colt such proportion of the excess of the capital stock of the said Colt's Patent Fire Arms Manufacturing Company, owned by the said testator at the time of his decease, above the amount of said stock specified and disposed of in said will, as five hundred shares thereof bears to the whole amount of legacies thereof given in said will, or a life estate for the natural life of said James, in such proportion of such excess.

And the petitioner avers that the aforesaid excess of said stock amounts to the number of seven thousand shares and over, and the proportion thereof in which the petitioner has an interest, as aforesaid, amounts to the number of two thousand shares and over.

That afterwards, to wit, on the 10th day of January, A. D. 1862, the said testator, deceased, being at the time of his decease possessed of and the owner of nine thousand nine hundred and ninety-six shares of said capital stock.

That prior to the decease of said testator the said Milton Joslin and J. Dean Alden, named in said will, had also deceased.

That at the time of the decease of the said testator he left surviving him one daughter, Henrietta Colt, a minor, since deceased, intestate, and one son, Caldwell Hart Colt, who is now a minor, and is the only surviving child of said testator, and Elizabeth Hart Colt, of said Hartford, has been legally appointed and now is ad-
91 ministratrix on the estate of said Henrietta, deceased, and guardian of the person and estate of the said Caldwell Hart Colt; and at the time of the decease of the testator there were then and now are in life sundry children of Christopher Colt, a brother of the testator, but then deceased, as set forth in said will, to wit, the eldest son of said Christopher, named in said will, and also the said Isabella DeWolf Colt, and three minor children, then and now under the age of twenty-one years, to wit, LeBaron B. Colt, Edward D. Colt, and Samuel Pomeroy Colt, of which minor children Theodora DeWolf Colt has been and is the legally appointed guardian; and all of whom are residents of said Hartford. And the said Samuel Caldwell Colt, named in said will, at the time of the decease of the testator, was and now is in life.

That afterwards, and on or about the 5th day of February, A. D. 1862, said wills and codicils were duly proved and approved in the probate court for the district of Hartford, in the State of Connecti-

cut, to which court probate thereof did by law appertain; and the said Elizabeth Hart Colt, and Richard D. Hubbard and Richard W. H. Jarvis, both of said Hartford, did then and there give bonds as executors of said will, became duly qualified as such, and took upon themselves the burden of said trust; and thereupon, at the request and on the motion of said executors, said court did allow the said executors the term of two years from said 5th day of February, A. D. 1862, within which to complete the settlement of said estate.

That said executors thereupon represented said estate to said court of probate as an insolvent estate, and said court thereupon duly appointed commissioners to hear and examine the claims that should be presented against said estate, to wit, William W. Eaton, Simon Towle, and George G. Sill, Esqrs.; and said court also then and there limited and appointed six months from the 27th day of February, A. D. 1862, for the exhibition of claims against said estate, of all which due and legal notice was given by advertising and posting.

And thereupon, from time to time, divers claims were presented to said commissioners against said estate, amounting in the whole, as this commissioner is informed and believes, and therefore avers,
to less than three hundred thousand dollars, which claims,
92 from time to time, without any action of the said commissioners thereon, were all adjusted and paid by the said executors, with the exception of sundry claims, the nominal amount of which is in the whole less than seventy-five thousand dollars, but upon which there is, in fact, and as said executors claim, a much less amount due; and the said commissioners have never had a meeting to act upon said claims, or any of them, and have in fact never acted upon them, and have never been requested by the said executors so to do, and have never made and have never been requested by said executors nor by said court of probate to make any report to said court of probate of claims allowed and disallowed by them, nor any other report whatever.

And the petitioner further avers that the inventory of said estate duly made and returned to the said court of probate amounted to a large sum, to wit, the sum of three million two huudred and fifty-seven thousand six hundred forty-four and $\frac{63}{100}$ dollars, being property within the State of Connecticut.

And this petitioner avers that said estate, in fact, is not and never was insolvent, but at the time of the decease of the testator, and ever since, has been and still is worth several millions of dollars over and above all debts due from said estate and all claims against it, and all expenses of settling the same.

That during the whole time aforesaid the said executors had and still have cash and cash funds in their hands to a much greater amount than all the debts due from the estate, and all the expenses and charges of settling the same, and all other expenses of every sort for which the said estate or the executors on behalf thereof are liable, so that none of said stock, or dividends thereon, or real estate or other property in said will specifically devised or bequeathed would

be needed to pay any portion of said debts, charges, and expenses, and all said stock and the dividends thereon can now and for a long time past could have been divided, transferred, and paid over to the legatees entitled thereto, without any loss, inconvenience, or damage to said estate, or to any of the respondents to this petition.

And the petitioner further avers that the said Colt's Patent Fire Arms Manufacturing Company is a corporation established
93 by authority of the State of Connecticut, and doing business at said Hartford, and for a long time past, both before and since the decease of the said testator, has been and now is, in pursuance of the provisions of their charter, employed in the manufacture of fire arms at an immense profit; that at the time of the decease of the testator the capital stock of said corporation consisted of ten thousand shares of one hundred dollars each, of which the testator was then the owner and possessor of nine thousand nine hundred and ninety-six shares, as aforesaid.

That since the decease of said testator the business of said corporation has been continued to a greater extent than before, and to a greater profit, the same having been in fact and practically conducted under the control and direction of the said executors, they having the control of nearly the whole of the stock, as the same at the time of the decease of the said testator stood in his name.

That since the decease of said testator there have been sundry dividends declared by said corporation on said capital stock, the amount of which this petitioner has no means of ascertaining, but which he is informed and believes, and therefore avers, amounts in the aggregate to nearly or quite the par value thereof; that all such dividends, so fast as they accrued, or were declared on that portion of said stock in which the petitioner is interested, have been received by, or are under the control of, the said executors, and they utterly refuse to state to him the amount of such dividends, or to account to him therefor, or to pay him the same, or any part thereof, though often thereto requested, especially on the ——— day of ———, A. D. 1863, but on the contrary they utterly deny that he has any right whatever to, or interest in, any of said stock or dividends under and by virtue of said will, and immediately after the probate of said will and said representation of said estate to said probate court as an insolvent estate, said executors applied for and obtained from said court an order allowing to said Elizabeth Hart Colt, widow of said deceased, and the executrix of said will, the sum of thirty thousand dollars annually, for the support of the family of said deceased during the settlement of said estate, which sum, as this petitioner is informed and believes, and therefore avers, has ever
94 since been, and continues to be annually paid her; and this petitioner avers that from time to time hereafter other dividends will be made on said capital stock.

And the said executors, on or about the 5th day of February, A. D. 1864, when the two years originally limited therefor was about expiring, applied to said court of probate for an extension of the

time for the settlement of said estate, to which the petitioner then and there objected, and such proceedings were had on said motion that said court, against the will and objection, did order and decree that the said executors should be allowed an additional year for the settlement of said estate; but this petitioner avers that said order constitutes no reason why said executors should not account for, and pay over to him, the dividends on the stock to which he is entitled, and why they should not be required and enjoined, from time to time hereafter, as dividends shall be declared, to collect, account for, and pay over the same to him, or why the prayer of this petition should not be granted.

And this petitioner avers that the stock in which he is interested under said will as aforesaid, and the dividends declared and to be declared thereon, by force of said will belongs to and should be transferred to him on the books of said company, or that they constitute a trust fund in the hands of said executors as trustees, which they are bound to hold, subject to the order of this court sitting as a court of equity, and from time to time account for, and as dividends have been, or shall be, declared thereon, to collect, account for, and pay over the same to this petitioner; and this petitioner avers that he is without any adequate remedy at law.

And this petitioner avers that the amount of said stock to which the petitioner is entitled under said will, and the amount of the dividends already accrued and declared thereon, amount respectively to a large sum, to wit, to the sum of two hundred thousand dollars and over.

And this petitioner avers that the respondents to this petition, and each of them, have, or claim to have, some interest, either legal or beneficial, in said residuary portion of said stock, and that it is necessary that they, and each of them, should be made parties to this proceeding, that their respective rights in said residuum
95 may be so ascertained and fixed as to be binding on all said parties; and this petitioner avers that each of said respondents had notice of all the facts herein alleged, from time to time, as the same occurred.

This petitioner therefore prays this court to ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will, and especially that this court would ascertain and fix the number of shares in which this petitioner has an interest under said will, and that they would require said executors to disclose, under oath, the number, date, and amount per share of each dividend declared by said corporation on said stock since the decease of the testator, what amount thereof, if any, has been collected by them, and what amount, if any, is uncollected.

And that this court would order and decree that said executors forthwith pay over to the petitioner the amount thereof so already collected, and that they forthwith collect any pay over to him the amount of such dividends, if any, yet uncollected by them, together with interest on both from the time the same were declared; also,

that from time to time hereafter, as dividends shall be declared on said stock, that they, on demand, collect and pay over the same to him, or that they, the said executors, execute and deliver to the petitioner a power of attorney, irrevocable during his life, authorizing him or his attorney to collect the same, free from all accounting to said executors, and to vote upon said stock at all meetings of said corporation, or that they transfer to him said stock or life interest therein on the books of said corporation, or that they give bond that they will hold the same safely during the life of the petitioner, and from time to time collect and pay over to him the dividends that may be declared thereon, and that they will give him the necessary powers of attorney to vote thereon at all meetings of said corporation.

Or that said executors transfer said stock to trustees, to be appointed by this honorable court, to hold the same for purposes declared in said will, or that this court would grant such other and further relief as to equity and justice may appertain.

And this petitioner, as in duty bound, will ever pray, &c.

Dated at Hartford, this first day of June, A. D. 1864.

JAMES B. COLT.

96 "A."

Col. Samuel Colt's Will.

Deceased January 10th, 1862.

I, Samuel Colt, of the city and county of Hartford, and State of Connecticut, do make and ordain this as my last will and testament.

I hereby revoke any and all wills and testaments by me heretofore at any time made.

I give, bequeath, and devise to my wife, Elizabeth Hart Colt, a gross legacy of thirty thousand dollars. Also the use and improvement during her life, of one thousand shares of the capital stock of the Colt's Patent Fire-arms Company. Also the use and improvement during her life, of my dwelling-house on the corner of Wethersfield avenue and Shamrock avenue, in said city of Hartford, with the lot on which the same stands, extending easterly as far as the eastern end of the hot-houses, and embracing the cottage, originally erected for my English gardener, Mr. Dray, the eastern line to be parallel with the front line. The above devise and bequests are in lieu of dower. Subject to the above devise and bequest, I give and devise said capital stock and lot and dwelling-house above described to the children which shall hereafter be born to me in lawful wedlock, to have and to hold to them and their heirs, as an absolute estate in fee simple. I also give and devise to each of the children which may hereafter be born to me in lawful wedlock, five hundred shares of the capital stock of the Colt's Patent Fire-arms Manufacturing Company.

I also give and devise to my executors hereinafter named and

their successors in said office the lot of land and dwelling-houses thereon, lying in the South Meadow so-called, and in said city of Hartford, within the Dykes, and bounded southerly on Masseek street, easterly on Huyshope avenue, northerly on Weehasset street, and westerly on Van Block street, as laid
97 down on the map hereunto annexed, which said map is verified by my own signature and the signatures of the attesting witnesses to this will. To have and to hold to them and the said executors and their successors in said office in trust to manage, collect and receive the rents and income of said premises, and to pay and appropriate so much thereof as shall be necessary for the education of the children which may hereafter be born to me in lawful wedlock, in such manner and proportions as they shall judge necessary, until said children, or those who shall survive of them, shall all have reached the age of twenty-one years, and when my youngest surviving child shall have arrived at the age of twenty-one years said premises, with all accumulations of income not expended for the purposes aforesaid, shall be divided amongst, and the same are hereby devised to said children, in equal proportions, as an estate in fee simple.

I give and bequeath to my stepmother, Mrs. Christopher Colt, of said city of Hartford, an annuity during her life of six hundred dollars per year, payable in yearly, half-yearly, quarterly, or monthly installments as she may desire, on condition that she will waive and relinquish any and all claims, actual or pretended, which she may have on my estate.

To my brother, James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement during his life of five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, and after the death of my said brother, to his issue lawfully begotten, as an absolute estate. This bequest is on condition that the said James B. Colt shall waive and relinquish all claims and demands, actual or pretended, which he may have against me or against said Colt's Patent Fire-arms Manufacturing Company.

I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the
98 same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate.

I give, devise, and bequeath to master Samuel Saldwell Colt, son of my late brother, John Caldwell Colt, an annuity of two thousand dollars per year, until he shall arrive at the age of twenty-one years, for his support, maintenance, and education; also when he shall

have arrived at the age of twenty-one years, a legacy of five thousand dollars in gross, and five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company; also the triangular lot on the south side of Charter Oak avenue, in the South Meadow, in said city of Hartford, and included within Huyshope avenue, Charter Oak avenue, and a new street parallel with and next north of Sequassen street and running in front of the building now used as tobacco warehouse, as laid down in the aforesaid map hereunto annexed, with the building called Charter Oak Block standing thereon, and all other buildings which may hereafter be erected on said lot. To have and to hold to him the said Samuel Caldwell Colt, and his heirs forever.

To the children of my late brother, Christopher Colt, I give and bequeath as follows: To Isabella DeWolf Colt an annuity of seven hundred and fifty dollars per year, until she shall arrive at the age of twenty-one years, to be appropriated to her support, maintenance, and education, and when she shall have arrived at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company. To each of the other children of my said brother, Christopher Colt, I give and bequeath an annuity of five hundred dollars a year, until they shall respectively arrive at the age of twenty-one years, for their support, education, and maintenance, and to each of said children last named, as they shall arrive at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of stock in Colt's Patent Fire-arms Manufacturing Company, to have and to hold to them and their representatives and assigns forever.

99 I give, devise, and bequeath to Colonel Luther P. Sargeant, now in charge of my armory in London, if he shall at the time of my decease be still in my employ, or in the employ of the Colt's Patent Fire-arms Manufacturing Company, fifty shares of the stock of said company; also a lot from my land on the eastern side of Weathersfield avenue, in the said city of Hartford—said lot is seventy-five feet in width and one hundred and fifty feet in depth, and is laid down and designated as No. 29, in square C, on the aforesaid map hereunto annexed—to have and to hold to him, the said Luther P. Sargeant, and his heirs forever, on condition, however, that he shall, within three years from my decease, erect a good dwelling-house on said lot, and occupy the same with his family, if he shall then have any.

I give, devise, and bequeath unto Elisha K. Root, of said Hartford, if he shall at the time of my decease still be in my employ, or in the employ of the Colt's Patent Fire-arms Manufacturing Company, fifty shares of the stock of said company; also a lot from my land on the east side of said Wethersfield avenue—said lot is seventy-five feet in width and one hundred and fifty feet in depth, and is laid down and designated as No. 31, in square C, on the afore-

said map hereunto annexed—to have and to hold to him, the said Root, and his heirs forever.

I give, bequeath, and devise to Milton Joslin, of said city of Hartford, if he shall at the time of my decease be still in the employ of myself, or of the Colt's Patent Fire-arms Manufacturing Company, fifty shares of the capital stock of said company; also a lot from my land on the east side of Wethersfield avenue—said lot is seventy-five feet in width and one hundred and fifty feet in depth, and is laid down and designated as No. 28, in square C, on the aforesaid map hereunto annexed—to have and to hold to him, the said Joslin, and his heirs forever.

I give, bequeath, and devise unto J. Dean Alden, of said city of Hartford, if he shall at the time of my decease be still in the employ of the Colt's Patent Fire-arms Manufacturing Company, or in my employ, twenty-five shares of the stock of said company; also a lot from my land on the eastern side of said Wethersfield avenue, in said city of Hartford—said lot of land is seventy-five feet in width and one hundred and fifty feet in depth, and is laid down and designated as No. 30, in square C, on the map aforesaid hereunto annexed—to have and to hold to him, the said Alden, and his heirs forever.

The three last devises of land above made to Elisha K. Root, Milton Joslin, and J. D. Alden respectively are made on condition in case of each, that such devisees shall within two years from my decease erect on the lot devised to him a good dwelling-house and occupy the same with his family if he shall then have any.

I give, devise, and bequeath to the following persons, viz., to the Governor of the State of Connecticut for the time being, to the secretary of said State for the time being, to the commissioner of the school fund for the time being, the mayor of the city of Hartford for the time being, the president of the Connecticut Historical Society for the time being, the superintendent of the Colt's Patent Fire-arms Manufacturing Company for the time being, the engineer of the State for the time being, the engineer of the city of Hartford for the time being, and Isaac W. Stewart, Henry Barnard, Henry C. Deming, and Richard D. Hubbard of said city of Hartford, and to their successors as hereinafter provided, twenty-five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, also a certain square of land in the southeastern corner of the city of Hartford within the dykes recently constructed in the south meadow and bounded easterly on Van Dyke avenue, southerly on Wawarme avenue, westerly on Hendrickson avenue, and northerly on Masseek street, also a lot of land on the south side of said Wawarme avenue and without the dyke, opposite said square of land above described and to be of the same size and shape, and within corresponding lines, together with all that tract of land which lies between said two squares of land above described and Connecticut river; the premises hereby devised are laid down on said map of land hereunto annexed, to have and to hold to them the several

persons above described and their successors as trustees for
101 the following purposes, uses, and trusts, viz., for the foundation and establishment of a school or institution for the instruction and education of young men in practical mechanics and engineering. Said trustees shall hold the revenue, income, and profits of the estate above devised to them for the period of five years from the time of my decease as an accumulating fund, and said fund at the end of five years from my decease shall be appropriated as follows: thirty per cent. for the erection of schools, workshops, and dwellings on the square above described lying within the dykes for the use of said institution, said buildings to be substantially erected of stone or brick; ten per cent. to be set aside as a fund for the support in part of such professors and teachers as may be employed in said institution; thirty per cent. for the purchase of books and treatises on the subject of mechanics and engineering and the necessary tools, implements, and instruments for giving instruction and employment in practical mechanics and engineering, and the remaining thirty per cent. for the support of the pupils in said institution. The estate above devised to said trustees, and the revenue, income, and profits thereof shall, after the lapse of five years from my death, be devoted to the general purposes of the institution in such manner as said trustees shall judge to be most promotive of the true intent and purpose of this devise, which is to afford assistance to needy and meritorious young men in the acquirement of such an education as will enable them to become skillful, practical mechanics and engineers.

The institution hereby founded shall be open to such young men as said trustees shall see fit to admit; but my desire is that preference should be given by said trustees to the sons of the men who are or have been in my employ or in the employ of said Colt's Patent Fire-arms Manufacturing Company, next to inhabitants of the city or town of Hartford, and next to inhabitants of the State of Connecticut, and lastly to such other pupils as said trustees shall see fit to admit on payment of adequate rates for tuition and instruction, &c. All pupils belonging to this State who shall be admitted by said trustees shall, if unable to pay the expenses of
102 their education in said institution, give such obligation, bond, or security as said trustees shall see fit to require for the payment to said trustees of the expenses of said education whenever, after leaving said institution, they shall be able to do so. All pupils from this State who are of sufficient ability, and all pupils from other States, shall pay such rates for tuition as said trustees shall prescribe. The pupils in said institution shall be dressed in appropriate uniforms, and their time, with due and reasonable allowance for healthful sports and recreation, shall be equally divided between theoretical studies in mechanics and engineering and practical employment in the workshop.

Said institution shall be under the care and management of said trustees, five of whom shall be a quorum, for the transaction of

business, and in case of death, resignation, or inability or disability of either or any of the four trustees last named shall occasion a vacancy in said board, the mayor of the city of Hartford, for the time being shall appoint a trustee to supply said vacancy temporarily, and the electors of the city of Hartford are empowered and requested, at their annual or other legal meeting, to elect by a vote a permanent trustee to fill such a vacancy; but every such person so appointed or elected shall be an elector of the town of Hartford. My oldest male relative, who for the time being is next of kin and bears my family name, and is twenty-one years of age at least, shall be entitled to be president of said board of trustees.

It is my desire that said trustees shall be incorporated as a body corporate and politic for the purposes and under the organization and with the order of succession above prescribed, to the end that the institution hereby intended to be founded shall be rendered as beneficent as possible, and remain perpetual.

To each of my executors hereinafter appointed I give, bequeath, and devise fifty shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, and also to each a building lot from my land on the east side of Wethersfield avenue, in said city of Hartford; said building lots are each about seventy-five feet in width and one hundred and fifty feet in depth, and are laid down
103 and designated on the map above referred to and hereunto annexed, with the name of the executor for whom each of said lots is intended; to have and to hold to each of said executors and his heirs the lot of land to him above designated, on condition that he shall within two years from my decease erect a good dwelling-house on the lot so designated and occupy the same with his family, if he shall then have any.

All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire-arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock and in precisely the same ratable porportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies and in precisely the same ratable proportions.

I hereby nominate and appoint my wife, Elizabeth Hart Colt, and my friends, Richard D. Hubbard and Henry C. Deming, of said city of Hartford, to be executors of this will, with all such powers and authorities as may be necessary to execute the same; and in

case my wife shall decline this trust, I hereby nominate and appoint Richard W. H. Jarvis, of Middleton, Conn., in her stead; and in case the office of either of said executors shall become vacant by death, resignation, or otherwise, at any time thereafter, I hereby authorize and empower my surviving or remaining executors to nominate and appoint a successor to fill said vacancy. And to each of said executors, in compensation for services in the execution of this trust, I hereby give and bequeath, in addition to the
104 legacy and devise hereinbefore given, one-fourth of one per cent. of the cash value of my whole estate.

In witness whereof, I have hereunto set my hand and seal, at the city of New York, in the State of New York, this sixth day of June, A. D. 1856.

SAM. COLT. [SEAL.]

The above and foregoing was signed, sealed, declared, and published by the above-named testator, Samuel Colt, as and for his last will and testament; in presence of the subscribers, who have hereunto, at his request, subscribed our names as witnesses, in the presence of said testator and of each other.

R. O. COLT, New York.
GEORGE LAW, New York.
SAM'L L. WHITE, New York.
HUGH ROSE, South Carolina.

"B."

Codicil.

I, Samuel Colt, of the city and county of Hartford, and State of Connecticut, do hereby make the following codicil to the foregoing will and testament:

I give and devise to my wife, Elizabeth Hart Colt, the use and improvement during her life of my dwelling-house on the east side of Wethersfield avenue, in said city of Hartford, with the lot of land on which the same stands, bounded west on said avenue, south on land of James B. Colt in part, and in part on my own land, the southern boundary being the northern boundary of James B. Colt's land extended in a straight line to Solomon Porter's land, east on Solomon Porter's land in part and in part on my own land, the eastern boundary being the western boundary of said Porter's land continued in a straight line northerly to said Porter's home
105 lot, and north on said Porter's home lot. This devise, with the others contained in said will, to be in lieu of dower.

I hereby revoke and cancel the legacy or annuity in said original will given to my step-mother, Mrs. Christopher Colt.

I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of Colt's Patent Fire-arms Manufacturing Company, given in the aforesaid will to James B. Colt, for life, remainder to his children; and, in lieu thereof, I give and bequeath said five

hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose.

I also revoke and cancel the devises of land made in said will severally to the persons hereinafter named, viz., to Luther P. Sargeant, Elisha K. Root, J. Deane Alden and each of my executors.

I give and devise to J. Deane Alden fifty shares of the capital stock of the Colt's Patent Fire-arms Manufacturing Company, in lieu of twenty-five shares named in said will, subject to the conditions named in said will.

I revoke the appointment of Henry C. Deming as executor of this will, and in his place appoint my brother-in-law, R. H. W. Jarvis. And in case either of the executors of this will shall decline the trust, I appoint my friend William W. Eaton to fill such vacancy.

I also revoke and cancel the legacy given in said original will to the children of my late brother Christopher Colt, so far as the oldest son of my said brother is concerned, and so far only; and lieu thereof I give and bequeath to said oldest son one-fourth part of what he would have received if the legacy to him in said original will had not been revoked.

In witness whereof, I have hereunto set my hand and seal, at the city and State of New York, this twelfth day of January, A. D. 1858.

SAM. COLT. [SEAL.]

106 The above and foregoing was signed, sealed, declared, and published by the above-named Samuel Colt, as and for his last will and testament by way of codicil to the original will therein named, in presence of the undersigned as subscribing witnesses, who have hereunto, at his request, severally subscribed our names in the presence of the said testator, and also in the presence of each other.

JOHN P. TREADWELL, New York.
R. B. COLEMAN, New York.
A. G. SMITH, New York.

"C."

Codicil.

I, Samuel Colt, of the city and county of Hartford, and State of Connecticut, do hereby make and establish the following codicil to my last will and testament in addition to the codicil heretofore made, dated January 12th, 1858:

I hereby cancel and revoke the devise and legacy heretofore made in and by said original will and codicil to the Governor of the State of Connecticut and others as trustees for the purpose of founding a school for the education of practical mechanics and engineers. My design is to abolish said devise and bequest.

I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and

wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them.

I give to the eldest son of my brother, Christopher Colt, a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to wit, five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said
107 Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of the said James B. Colt, and I hereby confirm and establish said original will as altered, changed, and modified by this and the previous codicil as and for my last will and testament.

In witness whereof, I have hereunto set my hand and seal this 2d day of February, 1859.

SAM. COLT. [SEAL.]

The above and foregoing codicil to the last will and testament of Samuel Colt was signed, sealed, declared, and published as and for his last will and testament by way of codicil, and in addition to said lastwill and testament by said testator in presence of us, who, at his request and in his presence, and in presence of each other, have hereunto signed our names as attesting witnesses.

H. SCOTT GOOD,
HUGH HARBISON,
FREDERICK S. BROWN.

The foregoing manuscript, comprises seventeen pages, is a true copy of the last will and testament and annexed codicils of Samuel Colt, late of Hartford, deceased, as on file proved and approved and ordered to be recorded in the probate office of the probate court within and for the county of Hartford, in the State of Connecticut, excepting the map of lands in the south meadow referred to in and annexed to said original will. Said will and codicils was exhibited in said court, proved and approved on the 6th day of February, A. D. 1862.

In testimony whereof, I hereunto set my hand and the seal of said court, this eleventh day of February, A. D. 1862.

HEMAN H. BARBOUR,
Judge of said Probate Court.

108 To the Sheriffs of the Counties of Hartford and Fairfield, his Deputy, and to either Constable of the Town of Hartford, within said County of Hartford, Greeting:

By authority of the State of Connecticut you are hereby commanded to summon Mrs. Elizabeth Hart Colt, as claiming an interest under the will of Samuel Colt, late of said Hartford, now deceased, also as executrix of said will, also as administratrix on the estate of Henrietta Colt, deceased, also as guardian of Caldwell Hart Colt, a minor under the age of twenty-one years; Richard D. Hubbard, as claiming an interest under said will, also as executor of said will; Richard H. W. Jarvis, as claiming an interest under said will, also as executor of said will; Elish K. Root, Henry C. Deming; Caldwell Hart Colt, a minor under the age of twenty-one years; Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, and Samuel Pomeroy Colt, all the three last being minors under the age of twenty-one years; Theodora DeWolf Colt, guardian of the three last-named minors, and Samuel Caldwell Colt, all of the said town of Hartford, and Luther P. Sargeant, of Westport, in said Fairfield county, to appear before the honorable superior court of the State of Connecticut, next to be holden at Hartford, within and for the county of Hartford, in said State, on the third Tuesday of July, A. D. 1864, then and there to answer unto the foregoing petition, and show cause, if any they have, why the prayer thereof should not be granted. T. C. Perkins recognized in $20 to prosecute, &c. Hereof fail not, &c.

Dated at Hartford, this 1st day of June, A: D. 1864.

CHAS. E. PERKINS,
Justice of the Peace.

109 STATE OF CONNECTICUT, } ss:
Fairfield County, }

WESTPORT, *June 29th*, 1864.

I then left with the within-named Luther P. Sargeant a true and attested copy of the within and foregoing petition, citation, summons, and order.

Attest: DANIEL BURR,
Sheriff's Deputy.

Fees:	Travel to serve and return petition, 68 miles	$3 40
	1 copy, 22 pages	5 50
	Service	12
	Two endorsements	25
		$9 27

HARTFORD COUNTY, *ss:*

HARTFORD, *June 2d*, 1864.

Then I left with each of the within-named persons, viz: Elizabeth Hart Colt, Richard D. Hubbard, Richard H. W. Jarvis, Elisha K. Root, Henry C. Deming, Caldwell Hart Colt, Isabella DeWolf Colt,

LeBaron B. Colt, Edward D. Colt, Samuel Pomeroy Colt, Theodora DeWolf Colt, Samuel Caldwell Colt a true and attested copy of the written and foregoing petition, citation, summons, and order.

Attest: RICHARD S. BURT, *Constable.*

Fees:	12 copies, 34 pages each	$102 00
	24 miles' travel	1 20
	Endorsement	25
		$103 45

110 Superior Court, Hartford County, December Term, 1865.

JAMES B. COLT *vs.* R. D. HUBBARD, EX'R, AND OTHERS.

Respondents' Answer.

The respondents deny the truth of the allegation in the petitioner's bill of complaint contained, and thereof put themselves on the court for trial.

HUBBARD & McFARLAND,
Attorneys.

111 Hartford County, Superior Court, September Term, A. D. 1865.

JAMES B. COLT *vs.* ELIZABETH H. COLT & AL.

Upon the petition of James B. Colt, of St. Louis, in the State of Missouri, against Elizabeth Hart Colt, Richard D. Hubbard, Richard H. W. Jarvis, Luther P. Sargeant, Elisha K. Root, Henry C. Deming, Caldwell Hart Colt, Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, Samuel Pomeroy Colt, Theodora DeWolf Colt, and Samuel Caldwell Colt, all of the town of Hartford, in the county of Hartford, brought to this court at a term thereof holden on the third Tuesday of July, A. D. 1864. Showing in substance among other things that Samuel Colt, late of said Hartford, deceased, by his last will and testament, and sundry codicils, had made sundry bequests and devises to the respondents, by virtue of which they are interested in his estate; that by said will Henrietta Colt, daughter of the said Samuel, was also interested in said estate by reason of a bequest to her; that since the decease of the said Samuel she had deceased; that the said Elizabeth Hart Colt is the administratrix of her estate; that the said Caldwell Hart Holt is a minor, and that the said Elizabeth Hart Colt is guardian of his person and estate; that the said LeBaron B., E. W., and Samuel Pomeroy, are minors; that the said Theodora DeWolf is their guardian, and that the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard H. W. Jarvis are executors of the said last will and testament; that said executors had represented said estate insolvent, and that sundry proceedings respecting the settlement of said estate had been had in the court of probate for the district of Hartford; that said estate was not in-

solvent, but was so represented, and said proceedings were had for the purpose of delaying the settlement of said estate; that the said executors refuse to account to the petitioner in respect to his interest in said estate, or to pay or transfer to him any part
112 thereof; and praying this court to ascertain the respective interests of the petitioner and respondents in said estate, and pass such orders as will secure to the petitioner his said interest and the enjoyment thereof, as by said petition, dated the 1st day of June, A. D. 1865, on file, will fully and particularly appear.

This court doth find that the said petition was duly served and returned to this court at a term thereof holden on the third Tuesday of July, A. D. 1864, when the parties appeared by their respective counsel and the said minors were duly represented by their guardians, and the said cause was continued to
when the respondents filed a demurrer to said petition, and the parties were at issue thereon, and this court having heard them by their respective counsel adjudged said demurrer insufficient and overruled the same, and ordered the respondents to answer over, and by legal removes and continuances the petition comes to the present term of this court, when the parties again appear and are at issue upon a general denial of the allegations in the plaintiff's bill as on file, and now the court upon due inquiry and examination made, doth find as follows, (viz:) The said Samuel Colt at the respective dates in said petition stated made the said will and testament and the said codicils, a copy whereof is annexed to this finding as part hereof to which reference may be had. Afterwards, (viz.,) on the tenth day of January, A. D. 1862, the said Samuel Colt, deceased, at Hartford aforesaid, leaving the said will and codicils in full force, and the same were afterwards, (to wit,) on the, ——— day of ——— A. D. 186 , exibited to the court of probate for the district of Hartford, and duly proved, and was approved by said court, and is in full force, the said Elizabeth Hart Colt, and the said Hubbard and Jarvis, are the duly qualified executors of said will. The parties in this cause are interested in the estate of the said Samuel, in manner and form and to the extent and proportion in said will and codicils expressed, set forth, and contained. The said estate was represented insolvent, as alleged in said petition, and the proceedings in the settlement thereof therein alleged were had. The said Milton Joslyn and J. Dean Alden named in said will, deceased prior to the decease of the testator. The testator, at his decease, left surviving
113 him one daughter, Henrietta Colt, a minor, who has since deceased, and the said Elizabeth Hart Colt is administratrix of her estate. The testator also left one son surviving him, (to wit,) Caldwell Hart Colt, a minor, and the said Elizabeth Hart Colt, is the legal guardian of his person and estate. There were also two other children of the testator, viz: Samuel J. Colt and Elizabeth E. Colt, both of whom died without issue after the execution of said codicils, and before the decease of the testator.

At the decease of the said testator there were in life and now are

in life sundry children of Christoper Colt, a brother of the testator, who was then deceased, to wit, the eldest son of the said Christopher, named in said will, and the said Isabella DeWolf Colt, and three children of the said Christopher, then minors under the age of 21 years, (to wit,) LeBaron B. Colt, Edward D. W. Colt, and Samuel Pomeroy Colt, of which minor children the said Theodora DeWolf Colt was and is the legal guardian, all of whom are residents in Hartford, but the said Edward D. W. Colt has since the last term of this court arrived at his majority.

The said court of probate allowed the said executors two years within which to complete the settlement of said estate in manner as stated in said petition. The inventory in said estate amounted to $\$3{,}257{,}644\frac{63}{100}$.

Said estate was never in fact insolvent, but has ever been worth a large sum over and above all the debts due from said estate, all claims against it, and the expense of settling the same.

It is now settled that neither the stock claimed by the petitioner nor the dividends thereon are required for the payment of any of said debts, claims, or expenses.

The Colt's Patent Fire-arms Manufacturing Company is a corporation established under the laws of the State of Connecticut, successfully and profitably employed both before and after the decease of said Samuel in the manufacture of fire-arms, substantially as alleged in said petition.

The capital stock of said corporation consisted of ten thousand shares, of which the said testator owned and possessed at his decease 9,996 shares.

Since the decease of said testator the business of said corporation has been successfully conducted in manner substantially as
114 stated in said petition. And sundry dividends have been declared on its capital stock.

Said dividends were subject to the control of said executors, but have not been drawn by them, and said executors have always refused to pay over or account for any part thereof to the petitioner, although often requested, and particularly on the —— day of ——, A. D. 186–, for the following reasons:

1. They were advised by counsel learned in the law, specially consulted for that purpose, that upon a proper construction of said will and codicils said James B. Colt took no interest whatever in said stock, or, if otherwise, that the nature and extent of said J. B. Colt's interest was so uncertain that said executors could not safely transfer said stock, nor any interest thereon, nor pay the dividends thereon to the said J. B. Colt, until specifically advised by the judgment of this honorable court in respect to the nature and extent of the interest aforesaid.

2. For the additional reason, also, that until less than one year last past it has been uncertain whether some portion of said stock (and if any, what portion) would not be required for the payment of debts. Just before the expiration of the two years originally lim-

ited for the settlement of said estate, said executors applied to said court of probate for still further time in which to settle said estate, to which the petitioners objected; but said executors obtained a decree of said court allowing them the additional term of one year, and since then said time has been still further extended by the court of probate, by the consent of the petitioner, and the time thus extended has not yet expired.

This court reserves for the advice of the supreme court of errors next to be holden in the county of Hartford, the following questions arising on the foregoing record:

1. Whether the interest taken in the residuum by James B. Colt is a life estate or an estate in fee?

2. Whether said Colt shall receive interest upon the dividends made on his residuary stock; and if so, from what time?

115 3. Have the legacies which the children of the testator, who deceased in his lifetime would have taken had they survived him, lapsed, or are they to be considered and treated as intestate estate?

4. Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will?

5. Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock under said will, or only one of them, or neither of them?

6. What is the amount of the residuum of the stock, and who are entitled thereto, and in what proportions?

This court also reserves all other questions arising upon the record, and also the question as to what decree shall be passed in this suit.

116 SUPERIOR COURT, *Hartford County:*

CLERK'S OFFICE.

The above and foregoing is a true copy of record in the superior court.

Attest: CHAUNCEY HOWARD, *Clerk.*

SUPREME COURT OF ERRORS, *Hartford County, ss:*

CLERK'S OFFICE.

The above and foregoing is a true copy of record in the supreme court of errors.

Attest: CHAUNCEY HOWARD, *Clerk.*

117 At a supreme court of errors holden at Hartford, within and for the county of Hartford, in the State of Connecticut, on the fourth Tuesday of February, in the year of our Lord one thousand eight hundred and sixty-six.

Present: Honorable Joel Hinman, chief judge; Thomas B. Butler, Charles J. McCurdy, John D. Park, Elisha Carpenter, associate judges.

JAMES B. COLT, of Saint Louis, in the State of Missouri, Petitioner,

vs.

ELIZABETH HART COLT, as claiming an interest under the will of Samuel Colt, late of Hartford, in the county of Hartford, deceased; also as executrix of said will; also as administratrix on estate of Henrietta, deceased; also as guardian of Caldwell Hart Colt, a minor under the age of twenty-one years; Richard D. Hubbard, as claiming an interest under said will; also as executor of said will; Richard W. H. Jarvis, as claiming an interest under said will; also as executor of said will; Elisha K. Root, Henry C. Deming, Caldwell Hart Colt, a minor under the age of twenty-one years; Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, and Samuel Pomeroy Colt (all the last three minors under the age of twenty-one years); Theodora DeWolf Colt, guardian of the three last minors; Samuel Caldwell Colt—all of said town of Hartford—and Luther P. Sargent, of Westport, in the county of Fairfield, Respondents, in a petition praying the superior court for said county of Hartford to ascertain and fix the amount of stock (in the residuum) to which said petitioner is entitled under said will, and for other and further relief as by petition on file, dated the 1st day of June, 1864, may more fully and at large appear.

Said petition was brought to the July term, 1864, of said court, and, by legal continuances, came to the September term
118 of said court, 1865, when certain questions, arising from the facts proven and found, were reserved for the consideration and advice of this court.

And now, said parties having been fully heard, this court doth consider, and doth advise said superior court—

1st. That the interest of James B. Colt in the residuum of stock is a life estate only.

2nd. That James B. Colt is not to receive interest on the dividends of stock, unless the superior court, on further inquiry, find that interest has been made by the executors, or the money has been used by them or by the Arms Company, in their business, so that they may fairly be said to have made interest upon the money, either directly or otherwise.

3d. That the legacies to the deceased children, who died before the testator, are to be treated as intestate estate.

4th. That the children of Chistopher Colt do not take any share in the residuum of stock, in respect to their legacy of five hundred shares given to them in the codicil to said will.

5th. "Jarvis takes—Deming does not."

6th. The amount of residuum of stock is 5,346 shares, of which

Mrs. S. Colt takes	$1,149\frac{21}{31}$
J. B. Colt, for life	$574\frac{26}{31}$
Samuel C. Colt	$574\frac{26}{31}$
Henrietta Colt, deceased	$574\frac{26}{31}$

Elizabeth E. Colt, deceased	$574\frac{26}{31}$
Samuel J. Colt, deceased	$574\frac{26}{31}$
Christopher's children	$459\frac{27}{31}$
Caldwell H. Colt	$574\frac{26}{31}$
R. D. Hubbard, R. W. H. Jarvis, Mrs. E. H. Colt, Executors	$57\frac{15}{31}$
L. P. Sargeant	$57\frac{15}{31}$
E. K. Root	$57\frac{15}{31}$

119 At a superior court, holden at Hartford, in and for the county of Hartford, in the State of Connecticut, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and sixty-six.

Present: Hon. Dwight Loomis, judge.

Upon the petition of James B. Colt, of Saint Louis, in the State of Missouri, containing sundry allegations (as per petition on file, reference to which is hereby made,) said petition was brought to the term of this court, holden at Hartford, on the third Tuesday of July, 1864, to which court the same was made returnable, when and where the petitioner appeared and the respondents also appeared. The respondents thereupon demurred to the sufficiency of said petition, which demurrer was overruled; and, by legal continuances, the said action came to the term of said court holden on the fourth Tuesday of September, A. D. 1865, when and where the respondents filed their answer, as on file, and this court, upon a hearing, found the following facts as proved in said case, viz.: This court doth find that the said petition was duly served, and returned to this court at a term thereof holden on the third Tuesday of July, A. D. 1864, when the parties appeared, by their respective counsel, and the said minors were duly represented by their guardians, and the said cause was continued to ———, when the respondents filed a demurrer to said petition, and the parties were at issue thereon; and this court having heard them by their respective counsel, adjudged said demurrer insufficient, and overruled the same, and ordered the respondents to answer over, and by legal removes and continuances, the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegations in the plaintiff's bill, as on file.

120 And now the court, upon due inquiry and examination made, doth find as follows, viz.:

The said Samuel Colt, at the respective dates in said petition stated, made the said will and testament, and the said codicils, a copy whereof is annexed to this finding as part hereof, to which reference may be had.

Afterwards, viz., on the 10th day of January, A. D. 1862, the said Samuel Colt, deceased at Hartford, aforesaid, leaving the said will and codicils in full force; and the same were afterwards, to

wit, on the —— day of ———, A. D. 186–, exhibited to the court of probate for the district of Hartford, and duly proved, and was approved by said court, and is in full force The said Elizabeth Hart Colt and the said Hubbard and Jarvis are the duly qualified executors of said will.

The parties in this cause are interested in the estate of the said Samuel in manner and form and to the extent and proportion in said will and codicils expressed, set forth, and contained. The said estate was represented insolvent, as alleged in said petition, and the proceedings in the settlement thereof therein alleged were had.

The said Milton Joslyn and J. Dean Alden, named in said will, deceased prior to the decease of the testator. The testator, at his decease, left surviving him one daughter, Henrietta Colt, a minor, who has since deceased, and the said Elizabeth Hart Colt is administratrix of her estate. The testator also left one son surviving him, to wit, Caldwell Hart Colt, a minor, and the said Elizabeth Hart Colt is the legal guardian of his person and estate. There were also two other children of the said testator, viz., Samuel J. Colt and Elizabeth E. Colt, both of whom died without issue after the execution of said codicils and before the decease of the testator.

At the decease of the testator there were in life, and are now in life, sundry children of Christopher Colt, a brother of the testator, who was then deceased, to wit, the eldest son of the said Christopher, named in said will, and the said Isabella DeWolf Colt, and three children of the said Christopher, then minors, under the age of twenty-one years, to wit, LeBaron B. Colt, Edward D. W. Colt, and Samuel Pomeroy Colt, of which minor children the said
121 Theodora DeWolf Colt was and is the legal guardian, all of whom are residents in Hartford; but the said Edward D. W. Colt has, since the last term of this court, arrived at his majority.

The said court of probate allowed the said executors two years within which to complete the settlement of said estate in manner as stated in said petition. The inventory in said estate amounted to $3,257,644.63.

Said estate was never in fact insolvent, but has ever been worth a large sum over and above all the debts due from said estate, all claims against it, and the expense of settling the same.

It is now settled that neither the stock claimed by the petitioner nor the dividends thereon are required for the payment of any of said debts, claims, or expenses.

The Colt's Patent Fire-arms Manufacturing Company is a corporation established under the laws of the State of Connecticut, successfully and profitably employed, both before and after the decease of said Samuel, in the manufacture of fire-arms, substantially as alleged in said petition.

The capital stock of said corporation consisted of ten thousand shares, of which the said testator owned and possessed, at his decease, 9,996 shares.

Since the decease of said testator, the business of said corporation

has been successfully conducted in manner substantially as stated in said petition, and sundry dividends have been declared on its capital stock. Said dividends were subject to the control of said executors, but have not been drawn by them; and said executors have always refused to pay over or account for any part thereof to the petitioner, although often requested, and particularly on the ——— day of ———, A. D. 186–, for the following reasons:

1. They were advised, by counsel learned in the law specially consulted for that purpose, that, upon a proper construction of said will and codicils, said James B. Colt took no interest whatever in said stock, or, if otherwise, that the nature and extent of said J. B. Colt's interest was so uncertain that said executors could not safely transfer said stock, nor any interest thereon, nor pay the dividends thereon to the said J. B. Colt, until specifically advised, by the judg-
122 ment of this honorable court, in respect to the nature and extent of the interest aforesaid.

2. For the additional reason, also, that until less than one year last past, it has been uncertain whether some portion of said stock (and if any, what portion) would not be required for the payment of debts. Just before the expiration of the two years originally limited for the settlement of said estate, said executors applied to said court of probate for still further time in which to settle said estate, to which the petitioner objected; but said executors obtained a decree of said court allowing them the additional term of one year, and since then said time has been still further extended by the court of probate by the consent of the petitioner, and the time thus extended has not yet expired.

Said court thereupon reserved for the advice of the supreme court of errors, next to be holden in the county of Hartford, the following questions arising on the foregoing finding of facts:

1. Whether the interest taken in the residuum by James B. Colt is a life estate or an estate in fee?

2. Whether said Colt shall receive interest upon the dividends made on his residuary stock; and, if so, from what time?

3. Have the legacies which the children of the testator, who deceased in his lifetime, would have taken had they survived him, lapsed, or are they to be considered and treated as intestate estate?

4. Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will?

5. Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock under said will, or only one of them, or neither of them?

6. What is the amount of the residuum of stock, and who are entitled thereto, and in what proportions?

Said court also reserved all other questions arising upon the record, and also the question as to what decree should be passed in this suit.

And now, in pursuance of the advice of the supreme court of errors given upon the reservation aforesaid, and upon further hearing before this court upon the question of interest upon dividends
123 hereinbefore declared, this court doth order, adjudge, and decree as follows, viz:

That the legacies by said will to certain children of the testator, who deceased before him, are to be treated as intestate estate.

That the children of Christopher Colt do not take any share in the residuum of stock in respect to their legacy of five hundred shares of said stock given to said executors in trust for them in the codicil of said will.

That the said Henry C. Deming does not take, under said will, the legacy of fifty shares given by said will to each of the executors thereof, nor does he take any interest in the residuum; but the said Richard W. H. Jarvis does take said legacy of fifty shares, and does also take a proportionate interest in the residuum.

The amount of the residuum of stock is five thousand three hundred and forty-six (5,346) shares, of which—

	Shares.
Mrs. S. Colt takes, in the manner specified in said will	$1,149\frac{21}{31}$
James B. Colt, for life	$574\frac{26}{31}$
Samuel C. Colt, in the manner specified in said will	$574\frac{26}{31}$
Caldwell Colt	$574\frac{26}{31}$
Henrietta Colt, deceased	$574\frac{26}{31}$
Elizabeth E. Colt, deceased	$574\frac{26}{31}$
Samuel J. Colt, deceased	$574\frac{26}{31}$
Children of Christopher Colt, in the manner specified in the will	$459\frac{27}{31}$
R. D. Hubbard, executor	$57\frac{15}{31}$
R. W. H. Jarvis, executor	$57\frac{15}{31}$
Mrs. S. Colt, executor	$57\frac{15}{31}$
L. P. Sargeant	$57\frac{15}{31}$
E. K. Root	$57\frac{15}{31}$

And this court further finds that the right, title, and interest of the said James B. Colt in and to the aforesaid $574\frac{26}{31}$ shares of said stock is a life estate only.

And this court, upon due inquiry made, doth further find that the net amount of dividends declared by said corporation on said $574\frac{26}{31}$ shares of said stock since the decease of said testator, and to
124 which dividends said James B. Colt and his assigns are entitled, with interest thereon, and deducting income tax paid by the executors, amounts, in the aggregate, to the sum of ($84,575.01) eighty-four thousand five hundred and seventy-five dollars and one cent, which amount the said executors are hereby required and enjoined to pay to said James B. Colt and his assigns, together with the cost of this petition, taxed and allowed at the sum of three hundred and thirty dollars and nine cents, which shall be included in said execution.

And it being further made to appear to this court that his interest in twenty shares of stock, with the dividends thereon, have been heretofore assigned and transferred by the petitioner to Samuel Woodruff and Henry B. Beach, partners under the name of Woodruff & Beach, and that his interest in forty-eight shares of said stock have been heretofore assigned and transferred by the petitioner to Hiram Bissell and Stiles D. Sperry, and it further appearing that the net amount of dividends already declared on said twenty shares and the interest thereon amounts to the sum of two thousand nine hundred forty-five dollars eight cents, and that the net amount of dividends already declared on said forty-eight shares and the interest thereon amounts to the sum of seven thousand fifty-eight dollars nineteen cents, and this court doth thereupon further order and decree that the executors aforesaid shall pay to said Woodruff & Beach the above sum of $2,945.08, and that the executors aforesaid pay to the said Bissell and Sperry the above sum of $7,058.19, and that they pay to said James B. Colt the balance of the above sum of $84,575 one cent, to wit, the sum of $74,571.74, and the cost of this petition, taxed and allowed at the sum of $330.09, and that execution issue therefor as above to the said parties respectively.

And this court doth further find that the total amount of dividends on said 574 $\frac{2}{3}\frac{6}{1}$ shares of stock from the decease of said Samuel Colt, on or about the 8th of January, 1862, to the present time, May 21, 1866, amounts to the sum of eighty-six thousand two hundred and twenty-five dollars seventy-five cents, the income tax on which has been heretofore paid by the executors in full, with the exception of the amount declared in the year 1865, amounting to the sum of $17,245.15, which amount has been included
125 by the executors in their return of the income of said testator's estate for the year 1865, made to the United States assessors, and which said executors are to pay, they having retained in their hands the amount thereof, and also excepting the dividends payable on said shares during the year 1866, prior to this date of May 21, 1866, amounting to the sum of $11,496.76, the income tax on which is also to be paid by said executors, they having retained in their hands the amount of said tax, estimating the same at ten per cent. on said sum of $11,496.76.

126 STATE OF CONNECTICUT, }
County of Hartford, } ss:

SUPERIOR COURT, CLERK'S OFFICE,
HARTFORD, *January 20th*, 1869.

The within and foregoing is a true copy of the records in the superior court and in the supreme court of errors.

In testimony whereof, I do hereunto subscribe my name and affix the seal of said superior court, this 20th day of January, 1869.

[SEAL.] CHAUNCEY HOWARD,
Clerk of Sup. Ct. and of Sup. Ct. of Errors.

[U. S. in. rev. stamp, 5 cents, cancelled.]

STATE OF CONNECTICUT, *County of Hartford:*

I, Dwight W. Pardee, judge of the superior court for said State, now presiding in court, in said county, do hereby certify that Chauncey Howard is clerk of said court within and for said county; that the signature to the foregoing certificate is his genuine official signature; and that the foregoing attestation is in due form.

DWIGHT W. PARDEE,
A Judge of the Superior Court of the State of Connecticut.

127 And on the 3d day of November, 1879, Elizabeth Hart Colt, R. D. Hubbard, R. W. H. Jarvis, Samuel C. Colt, and Caldwell H. Colt, respondents, filed their answer in the words and figures following, viz:

United States Circuit Court, District of Connecticut.

LEBARON B. COLT *et al*
vs.
ELIZABETH HART COLT *et al.*

Answers of Elizabeth Hart Colt, R. D. Hubbard, R. W. Jarvis, Samuel C. Holt, and Caldwell Hart Colt, Respondents.

128 Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH HART COLT *et al.* } In Equity.

Answer of Elizabeth Hart Colt, Richard D. Hubbard, and R. W. H. Jarvis.

And now these defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill contained, as amended, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to answer unto, do, answering, say:

These defendants admit that the said Samuel Colt died, leaving a will and codicils, as is alleged in said bill, and that these defendants were duly appointed therein the executors of said will, and that they accepted said appointments and qualified, and ever since have been and now are said executors; and that said will and codicils have been duly proved and approved, as stated in said bill.

And these respondents admit that the petitioners are the children or representative of the children of Christopher Colt,
129 deceased, and that under said will they took certain interests in the estate of said Samuel Colt, as is set out in said will. And admit that said Theodore DeWolf purchased all the interest of said Edward D. Colt in said estate, as is alleged in said bill. And that at the decease of said Colt he owned the 5,346 shares of

stock, which were not needed to pay debts, but passed under the residuary clause of his will.

And they admit that James B. Colt died, as is alleged in said bill, and that these defendants now have in their hands the said $574\frac{26}{31}$ shares of said stock, the income of which they paid to him during his life.

And they admit that the allegations of said bill as to the amount of stock and dividends received by the petitioners are true.

And they admit that the allegations of said bill as to the age of the petitioners, and the time when they attained their majority, are true; and that the allegations of said bill, so far as they allege the proceedings theretofore had in the superior and supreme courts of the State of Connecticut, and the intention of these defendants to set them up and rely upon them in this case, are true; and that the allegations of said bill, so far as they allege that all debts and charges due from the estate of said Colt have been paid, and that said executors rendered accounts to the probate court, as set out in part in said bill, are true.

And as to all the allegations contained in said bill not herein expressly admitted to be true, except such as these respondents state they are not informed concerning, these respondents deny the truth of the same.

And for further answer in this behalf the said respondents further allege that heretofore, to wit, on or about the first day of June, A. D. 1864, the said James B. Colt brought his bill in equity to the superior court for Hartford county, in the State
130 of Connecticut, asking said court, among other things, to construe the said will and codicils of said Samuel Colt, and to determine the amount of the residuum of the estate of said Samuel Colt, and the residuum of said stock, and to decide and determine which of the parties mentioned in said will were interested in said residuum of stock, and in what amounts, and what proportions, which suit is the same one referred to in the petitioners' bill in this cause, and these respondents aver that said petitioners, to wit: Isabella DeWolf Colt DeWolf, then IsabellaDeWolf Colt, LeBaron B. Colt, and Samuel Pomeroy Colt, and also said Edward D. Colt, were made parties to said petition, and were duly served with process therein.

And the respondents aver that at that time the said Theodora DeWolf Colt was the mother of the said Edward, LeBaron, and Samuel, who were then minors, and that she had theretofore been legally appointed, and then was, the guardian of said minors, and in her said capacity as guardian was made a party to said proceeding and served with process therein, and these respondents aver that all the petitioners and respondents in the present petition, or those who then legally represented them were also made parties to those proceedings.

And these respondents aver that they have no knowledge whether, as a matter of fact, guardians *ad litem* were appointed in said suit for

said minors, otherwise than as appears in the decree passed therein, but they aver that the said minors, and their said guardian, Theodora DeWolf Colt, did in fact appear in said suit by counsel employed for them, to wit, by Henry C. Robinson, Esq., of said Hartford, at the term of said court, to which said proceedings were made returnable, and did appear and become parties to said proceedings, and were duly heard therein by said counsel who was so employed by them, and that in and by the decree of said court it was found as a fact that the parties to said proceedings appeared by their respective counsel, and the said minors were duly represented by their guardians, and these respondents aver that the said finding and decree of said court in said cause imports absolute verity, and is conclusive as to the matters so found, and that it is binding and conclusive upon these petitioners.

And these respondents aver that according to the law and practice in the State of Connecticut, when minors are made de-
131 fendants in action at law or equity, and such minors have a guardian duly appointed, which guardian is cited to appear, and does appear in said suit, that it is not usual or necessary to have any special guardian *ad litem* appointed.

And they aver that upon the trial of said cause it was among other things adjudged by said court, that the said James B. Colt was entitled to a life estate in said $574\frac{2}{3}\frac{6}{1}$ shares of said stock, and that the said Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, and Samuel Pomeroy Colt, had no right in and were not entitled to any share in the residuum of stock belonging to said estate in respect to their legacy of five hundred shares of said stock given to them by said will, and which was to be held in trust for them by the executors of said will as is therein provided, and in and by said decree the court stated, defined, ascertained, and adjudged who were the persons entitled to the said residuum of stock, and in what amounts, except as to the $574\frac{2}{3}\frac{6}{1}$ shares above mentioned.

Which said judgment and decree of said court has never been reversed or annulled, but is still in full force, as by the files and records of said court, ready in court to be produced, will more fully appear.

And these respondents further allege that, in pursuance of said decree, and in accordance therewith, they did thereupon, to wit, on the —— day of ————, A. D. 186–, divide up, and transfer to and among the respective persons so held thereby to be entitled to the same, the whole of said residuum of stock, and so conveyed to the said children of Christopher Colt, or to those respondents as trustees for those of them who were minors, $459\frac{2}{3}\frac{7}{1}$ shares of said stock, being the said amount of said residuum so found to be due to said children; and thereupon, to wit, on the —— day of ————, A. D. 1866, these respondents filed in the court of probate, for the district of Hartford, which court had jurisdiction of the settlement of the said estate, their, the respondents', account as executors of the settlement of said estate, showing the disposition so made by them

of the residuum of said stock, and also of that specifically devised by said will, which said account was on the second day of July,
132 A. D. 1866, duly and legally allowed, accepted, and approved by said court, which said allowance has never been appealed from, reversed, or set aside, but is in full force and effect.

And these respondents, further answering, say that afterwards, to wit, on the —— day of ———, A. D. 1866, the said court of probate duly and legally appointed distributors to distribute all the testate estate of the said Samuel Colt, not specifically devised by said will, and said distributors made such distribution, and the same was on the 14th day of July, A. D. 1866, returned to said court of probate, and was by said court duly accepted and approved, and the same has never been appealed from, set aside, or annulled, and is still in full force and effect.

And these respondents further state that afterwards, to wit, on the fifth day of August, A. D. 1870, and the tenth day of January, A. D. 1873, they filed further accounts of the settlement of said estate as such executors, in and by which accounts the said estate was finally adjusted and settled, which said accounts were on said respective days allowed, accepted, and approved by said court, and the allowance thereof has never been appealed from, reversed, or set aside, but are still in full force and effect, as by the files and records of said probate court, ready in court to be shown, will appear.

And these respondents aver that the said decree of said superior court, and the orders, decrees, and proceedings of said court of probate in the settlement of said estate, and the conveyances of said stock in pursuance thereof and accordance therewith, are final and conclusive as to all matters therein contained as against these petitioners, and are a bar to the further prosecution of this petition, so far as any rights of the petitioners to any part of the residuary stock are concerned.

And the respondents deny that the said petitioners are or were entitled to any more shares of the said residuum of the said stock than they have received, or any accumulations thereon.

And these respondents aver that on or about the 11th day of February, A. D. 1873, and after all the petitioners had become and were of full age, these respondents settled and accounted with each and all of these petitioners for all matters and things
133 connected with the said trust stock so held by these respondents under said will, and each of the petitioners then and there executed and delivered to these respondents discharges in writing in substance as follows, to wit:

Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees, under the will of the late Samuel Colt, my proportional share of five hundred shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children, except the oldest, of Christopher Colt, and of the accumulations thereof, viz.:

Shares..... 125
Cash..... $31,759.01

In consideration whereof, I hereby release, discharge, and acquit the said Colt, Hubbard, and Jarvis, trustees as aforesaid, from any and all further accountings, actions, or causes of action for and on account of said trust.

JANUARY, 11, 1873.

And these respondents allege that on the said last named day these respondents settled and accounted with each and all of the petitioners for all claims of every kind which they or either of them then had against the estate of said Samuel Colt under the said will or otherwise, and against these respondents as executors of the said will, (except said 574 $\frac{26}{51}$ shares, a life estate, in which was bequeathed to the said James B. Colt, and these petitioners then and there executed and delivered to these respondents a release and discharge in writing, under seal, in substance as follows, viz.:

Received, Hartford, January 11th, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of $2,975.24, being our full proportional interest and share in the balance of said estate in hands of said executors, as per their final administration account, this day rendered and accepted in the court of probate; and having previously received in full the various other sums, lega-
134 legacies, annuities, devises, and distributions, coming to us under said will and previous settlements and administrations, to our entire satisfaction, we hereby, in consideration thereof, release, discharge, and acquit the said Colt, Hubbard, and Jarvis, executors as aforesaid, from any and all further accountings, actions and causes of action, excepting, however, the question of our interest in the remainder of the 574 $\frac{26}{51}$ shares of the capital stock of the Colt's Patent Fire-arms M'f'g Co., bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined.

ISABELLA C. DEWOLF, [L. S.]
By F. E. DEWOLF, *Attorney.*
SAMUEL P. COLT. [L. S.]
LEBARON B. COLT. [L. S.]
THEODORA DEW. COLT, [L. S.]
Assignee by purchase of the Estate of Edward D. Colt, remaining after settlement of administration account.
By HENRY C. ROBINSON,
Her Attorney.

As by said instrument, ready in court to be produced, will more fully appear.

And as to so much of said bill as refers to the action of these defendants in the said suit brought by James B. Colt, these defendants say that they were cited to appear therein as executors of said will, and did appear therein; that they employed counsel in whom they

had confidence, to wit, Benjamin R. Curtis, Origen S. Seymour, and William W. McFarland, to appear in said cause and present such questions for the consideration of said court regarding the construction of said will as to them should appear well founded in the law, which was so done by said counsel. That these respondents, as such executors, did not appear or act particularly as trustees for or on behalf of said petitioners, because these petitioners were duly made parties to the proceeding by themselves and by their guardian, and appeared therein by able counsel, and were fully heard.

And as to so much of said bill as asks for the whole or any part of said $574\frac{26}{31}$ shares of stock, in which a life estate was given to said James B. Colt, these respondents say, that they
135 now hold the same as executors for and in behalf of the persons duly entitled thereto under said will, and are now and always have been ready to dispose of the same in accordance with the orders of any proper court having jurisdiction thereof, but these respondents allege that they are informed and believe that the said James B. Colt left children who are now alive, and who claim to have certain rights and interests in and to said stock, some of whom reside out of this State and district, and who are not made parties to this proceeding, so that no final decree can be made in this proceeding as to the disposition of said stock which will affect all parties claiming an interest therein, and they submit to this court the question whether or not the question of the distribution and division of said shares does not by law appertain to the probate court for the district of Hartford, in which such estate was settled, which court will have power to make a final settlement of the matter in such a way as will finally dispose of the same as against all claimants and persons whatever. All which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ELIZABETH HART COLT.
RICHARD D. HUBBARD.
R. W. H. JARVIS.

UNITED STATES OF AMERICA, *District of Connecticut:*

On this 31st day of October, A. D. 1879, personally appeared Elizabeth H. Colt, Richard D. Hubbard, and R. W. H. Jarvis, who signed the foregoing answer, and made oath in due form of law, that the statements and allegations contained in said answer are true. Before me:

[SEAL.] WM. WALDO HYDE,
Notary Public.

136 Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *and al*
vs.
ELIZABETH HART COLT *and al.* } In Equity.

Answer of Samuel C. Colt, one of the Defendants to the above-entitled Bill.

And now this defendant, in answer to the said bills, avers that he has heard read the answer made and filed in this cause by Elizabeth Hart Colt, Richard D. Hubbard, and R. W. H. Jarvis; that he believes the statements and allegations therein contained to be true, and he prays that all the allegations of said answer may be taken and deemed to be made in and by this answer in the same manner as if they were fully set out herein, and he avers that he fully believes the statements and allegations contained in said answer to be true.

Wherefore he prays that he may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

SAMUEL C. COLT.

UNITED STATES OF AMERICA, *District of Connecticut:*

On this 23d day of September, A. D. 1879, personally appeared before me, Samuel C. Colt, signer of the foregoing answer, and made oath in due form of law that the statements therein contained are true.

Before me: CHARLES E. GROSS,
Notary Public.

137 Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH HART COLT *et al.* } In Equity.

Answer of Caldwell Hart Colt, a minor under the age of twenty-one years, by Elizabeth Hart Colt, his guardian, one of the defendants to the above-entitled bill.

And now the said Elizabeth Hart Colt, as guardian of the said Caldwell Hart Colt, a minor, in answer to the allegations of said bill, refers to the answer filed therein by herself, Richard D. Hubbard and R. W. H. Jarvis, and prays that all the allegations of said answer may be taken and deemed to be made in and by this answer, in the same manner as if they were fully set out herein, and avers that the allegations and statements therein contained are true.

Wherefore she prays that she may be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

ELIZABETH H. COLT,
Guardian for Caldwell Hart Colt.

UNITED STATES OF AMERICA, *District of Connecticut:*

On this 31st day of October, A. D. 1879, personally appeared before *before* me Elizabeth Hart Colt, signer of the foregoing answer, and made oath in due form of law that the statements therein contained are true.

WM. WALDO HYDE,
Notary Public.

138 And on the 1st day of December, 1879, amendment to bill was filed in the words and figures following, to wit:

Circuit Court of the United States, District of Connecticut, September Term, 1879.

LEBARON B. COLT *et al.*
vs.
ELIZABETH HART COLT *et al.* } In Equity.

Amendment to Bill.

By leave of the court, the plaintiffs hereby amend their bill, as follows:

On the second (printed) page of said bill add these word at the end of the first paragraph after the words "will of said Samuel Colt," "and against Miss Alice B. Colt and Norman Colt, of Redwood City, in the State of California, both citizens of the State of California, and James Colt, of the city of St. Louis, in the State of Missouri, they being the only children and heirs-at-law of James B. Colt, late of Wethersfield, in the State of Connecticut, deceased, and Hugh Harbison, of the city of Hartford, and State of
139 Connecticut, a citizen of said State of Connecticut, as he is administrator of the estate of said James B. Colt, deceased.

And on the 24th day of December, 1879, G. G. Sill, Esq., entered his appearance for Alice B. Colt, Norman Colt, and James Colt, and on the samd day subpœna issued to Hugh Harbison, in the words and figures following, viz:

140 [SEAL.] The President of the United States of America to the Marshal of the District of Connecticut sendeth greeting:

You are hereby commanded to summon Hugh Harbison, of the city of Hartford and State of Connecticut, a citizen of said State of Connecticut, as he is administrator of the estate of James B. Colt, deceased, to appear before the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of January, 1880, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said Hugh Harbison, Elizabeth Hart Colt, R. W. H. Jarvis, R. D. Hubbard, and others, in said court, by LeBaron B. Colt, Samuel P. Colt, and Theodora G. Colt, assignee of

the right, title, and interest of her son, Edward D. Colt, deceased, under the will of Samuel Colt, deceased, the said DeBaron B., the said Samuel P., and the said Theodora G. Bolt, all of Bristol, in the county of Bristol, in the State of Rhode Island, citizens of said State of Rhode Island; Frank E. DeWolf and Isabella D. W. Colt DeWolf, wife of said Frank E. DeWolf, in right of said Isabella, of San Francisco, in the State of California, and citizens of said State of California, and then and there to answer the same, and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of January, 1880.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 2d day of December, A. D. 1879.

E. E. MARVIN, *Clerk.*

The defendant is required to enter his appearance in said cause in the clerk's office of said court, on or before the day at which this writ is returnable, or, by the rules of said court, said bill will be taken as confessed.

E. E. MARVIN, *Clerk.*

S. E. BALDWIN,
Complainant's Solicitor, New Haven, Conn.

140½ UNITED STATES OF AMERICA, } ss.:
District of Connecticut, Hartford County, }

HARTFORD, *Dec. 10th*, 1879.

Then and there I served the within writ on Hugh Harbison, herein named, by delivering to and leaving with Mary O'Brien, his servant, at his usual place of abode, a true and attested copy hereof.

Attest: JOS. D. BATES,
U. S. Marshal.

Fees:	Service	$2 00
	Copy	1 00
	Travel	24
		$3 24

141 And on the 24th day of February, 1880, answers of Alice Colt, Norman Colt, and James Colt, was filed, in the words and figures following, to wit:

Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al* }
vs. } In Equity.
ELIZABETH HART COLT *et al.* }

Answer of Alice B. Colt, Norman Colt, and James Colt.

And now these defendants, now and at all times hereafter saving

and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainants' said bill contained, as amended, for answer thereto, or unto so much or such parts thereof as these defendants are advised is or are material or necessary for them to answer unto, answering, say:

These defendants deny that the complainants are entitled to the whole or any part of the five hundred and seventy-four $\frac{6}{31}$ shares of stock in which James B. Colt had and enjoyed a life estate. On the contrary, they say and claim that their late father, James
142 B. Colt, was entitled to the fee in said shares, and that they, as his only heirs-at-law, are now entitled to the fee in said shares.

These defendants deny that their interest in the residuum of the stock in said company, in respect to the legacy of five hundred shares of said stock, given to the executors in trust for the lawful issue of James B. Colt, was taken away by any codicil to the will of said Samuel Colt. On the contrary, they claim that they are entitled to a share in the residuum of said stock in respect of said legacy of five hundred shares, and that there was no revocation of their interest in said residuum.

And as to all the other allegations contained in said bill, not inconsistent with the foregoing denials, these defendants admit the same to be true.

ALICE B. COLT
NORMAN COLT.
JAS. COLT.

143 UNITED STATES OF AMERICA, *District of California:*

On this ninth day of February, A. D. 1880, personally appeared before me Alice B. Colt and Norman Colt, signers of the foregoing answer, and made oath to the truth of the statements therein contained in due form of law.

[SEAL.] GEO. C. ROSS,
Notary Public, County of San Mateo, State of California.

On this 19th day of February, A. D. 1880, James Colt personally appeared before me, and made oath that the matters and things stated in the annexed answer are true to the best of his information and belief.

[SEAL.] JNO. A. CLARKE,
Notary Public, D. C.

144 And on the 10th day of March, 1880, the complainants filed their replication to the answer of Elizabeth Hart Colt, Richard D. Hubbard, and R. W. H. Jarvis, defendants, in the words and figures following, viz.:

In the Circuit Court of the United States for the Second Circuit, in the District of Connecticut.

LeBaron B. Colt *et al.*
vs.
Elizabeth Hart Colt *et al.* } In Equity.

The Replication of LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. DeWolf and Isabella D. W. Colt DeWolf, his wife, complainants, to the Answer of Elizabeth Hart Colt, Richard D. Hubbard and R. W. H. Jarvis, defendants.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to manifold insufficiencies of the said answer, for replication thereunto say, that they will aver, maintain and prove the said bill of complaint of these
145 repliants to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in and by said bill they have already prayed.

SIMEON E. BALDWIN,
Solicitor for Complainant.

146 And on the same day the complainants filed their replication to the answer of Samuel C. Colt, defendant, in the words and figures following, viz:

In the Cricuit Court of the United States for the Second Circuit, in the District of Connecticut.

Le Baron B. Colt *et al.*
vs.
Elizabeth Hart Colt *et al* } In Equity.

The Replication of LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. De Wolf, and Isabella D. W. Colt DeWolf, his wife, complainants, to the Answer of Samuel C. Colt, defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver, maintain, and prove the said bill of complaint of these

repliants to be true, certain, and sufficient in law to be an-
147 swered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by said bill they have already prayed.

SIMEON E. BALDWIN,
Solicitor for Complainant.

148 And on the 10th day of March, 1880, the complainants filed their replication to the answer of Caldwell Hart Colt, defendant, in the words and figures following, viz. :

In the Circuit Court of the United States for the Second Circuit, in the District of Connecticut.

LeBaron B. Colt *et al.*
vs.
Elizabeth Hart Colt *et al.* } In Equity:

The Replication of LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. DeWolf, and Isabella D. W. Colt, DeWolf, his wife, complainants, to the Answer of Caldwell Hart Colt, a minor, by Elizabeth Hart Colt, his guardian, defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver, maintain, and prove the said bill of complaint of these repliants to be true, certain, and sufficient in law
149 to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by said bill they have already prayed.

SIMEON E. BALDWIN,
Solicitor for Complainant.

150 And on the 3d day of April, 1880, complainants' evidence was filed, in the words and figures following, viz :

Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH H. COLT *et al.* } In Equity.

Evidence in Chief for the Complainants

Taken before E. E. Marvin, examiner, at New Haven, April 3d, 1880.

THEODORA G. COLT, sworn:

I am one of the complainants; reside in Bristol, R. I.; have lived there fourteen years; I went there April 27th, 1866, and previous to that time I resided in Hartford; am the widow of Christopher Colt; I recollect a suit brought by James B. Colt, in the superior court for Hartford county, Connecticut, in 1864; I was at that time guardian for my minor children; I did not employ any counsel to represent me in that suit, or to represent my children; I was appointed guardian of my children through the probate court at Hartford; I did not enter any appearance in that suit directly myself; I was not at that time acquainted with legal business; I had
151 never been party to a lawsuit before; I did not understand that it was necessary to employ counsel to appear for myself and children, because I thought that the executors would defend the suit and the interest of myself and children at the same time. I was personally acquainted with the executors; I had known them about eight years; I had confidence in their judgment and ability; what I have said applies to the suit in its progress through both courts, the supreme as well as the superior; I first learned the nature of the argument or brief presented by the executors in this James B. Colt suit in the supreme court of errors about a year since.

I refer to the printed brief, Exhibit D, annexed to the bill in this cause; I knew previous to that that it was argued by Mr. Macfarland, from hearsay; I knew that it was against the claim of my children; I learned this almost immediately after the argument; that was my first knowledge that they were intending to argue against my children, to my great surprise; before that time I supposed that they would defend the interest of my children to the utmost of their power; being trustees, as well as executors, I thought they were in duty bound to do so; I heard nothing of any brief or appearance by counsel on my behalf, or as guardian, before the trial; I was first informed of any such brief or appearance purporting to be in my behalf about a year ago; there were payments of money made to me as guardian for benefit of the children by Gov. Hubbard, Mr. Jarvis, and Mrs. Colt, trustees under the will of Samuel Colt; these payments commenced in January, 1863; I have two letters from Gov. Hubbard, one dated Dec. 6th, 1862, and one Jan. 20th, 1863, which I received from him in regard to
152 such payments. [The letters are produced and copies are

hereto annexed and marked Exhibits F and G respectively.] There was $500 paid me per annum for each of the elder children from the trust fund, in addition to $500 a year annuity, and $300 from the trust fund for the youngest—that is, Pomeroy. It was afterwards increased to $700 from the trust fund for each of the eldest, stopping when they became of age.

I have a letter from Gov. Hubbard in regard to the James B. Colt suit, after the decision, which I here produce. It is dated May 11th, 1866. [Copy annexed and marked Exhibit H.]

Cross-examined by Mr. PERKINS:

I had lived in Hartford, prior to 1866, about eight years—that is, in Hartford and West Hartford. I was made a party to the suit brought by James B. Colt, spoken of in the direct examination, and served with the process. I knew generally about the suit in progress—that it was going on, etc. I knew the time of the trials in that case, both in the superior and supreme courts. During these eight years I had no counsel whatever that I consulted. There was no other suit brought by my children as to their rights under the will about that time. There was some doubt about the back dividends, but no suit. I wrote to Charles Chapman about them. In the settlement they were not alluded to. Mr. Henry C. Robinson, of Hartford, did not appear for me in any suits or matters for me, or for me as guardian of the minor children, or for the minor children. I knew at that time that it was usual for parties to lawsuits to employ counsel to protect their rights. I thought the executors, as trustees for the children, would
153 employ counsel to look after their interests. I had some conversation with Gov. Hubbard on the subject, and he told me everything would be done to oppose Judge Colt's claim, and consequently I thought the interests of the executors and of my children were identical, and that there was no necessity for my action in the case. I was always led by him to suppose it was so. I asked him if the executors would employ counsel in the James B. Colt suit, and he told me they would employ Judge Curtis. I thought the suit was simply against the estate, and nothing else was involved. I did not know that any interests of my children were involved, only as the whole estate was involved. I had no such idea. I supposed that the executors, in opposing Judge Colt's claim, were acting for my children, and so far as I knew, the interests of my children and of the estates generally were identical.

The first time that I learned that the interests of my children were adverse to the interests of the estate generally was a short time before the case was brought to hearing in the supreme court.

My son Edward told me that Judge Colt intended to bring up that point in regard to the residuum left to the trustees. I went to Judge Colt and requested him not to bring up that point. He agreed not to do so. Consequently I thought it was an end to that. I supposed that the executors were bound by their oaths to defend

their trust, no matter whether my children took it or Judge Colt's children. I did not apply to the executors to know if they would defend that trust, because I thought it impossible but that they would do so. I first learned that the question had been decided against my children in the supreme court just after it was so decided. I learned this from my son Edward.

154 I knew that Mr. Robinson had appeared in the supreme court and made some few remarks, but as I had never employed him, I did not think much of it; I do not know who employed him or who paid him; I did not think much about it, as he was not my lawyer or employed as my counsel; I did not think much about it; I made no efforts to have a rehearing; I thought it would be useless before the same court; I made inquiry of Mr. Fred. B. Perkins, of Hartford, and I was told it was useless, that there was no higher court. I did not join with the executors in opposing Judge Colt's claim, that is my employing counsel. When I said in my direct examination that I first knew of the appearance of counsel purporting to be on my behalf in the supreme court about a year ago, I meant that I then first knew that it was claimed Mr. Robinson appeared for me or my children; I knew he appeared and argued, but did not know it was claimed that he argued for me or them by authority.

Re-direct by MR. BALDWIN:

When I say that I knew that Mr. Robinson appeared and argued in the Judge Colt case for myself and children, I say I knew it because my son Edward told me so; Edward died Oct. 10, 1868; I never received any bill from Mr. Robinson for legal services in that case, or for any professional services.

Re-cross-examination:

Gov. Hubbard's letter, Exhibit H, where it speaks of this last trouble, refers to the decision of the supreme court made against my children, and my letter to him, to which he refers, was in relation to the same matter.

THEODORA G. COLT.

155 Subscribed and sworn to before me, this 3d day of April, A. D. 1880.

E. E. MARVIN, *Examiner.*

[Copy.]

EXHIBIT F.—E. E. MARVIN, *Examiner.*

HARTFORD, *Dec.* 6, 1862.

MY DEAR MADAM: I was, perhaps, too fast in assuring you that your children could draw from dividend account before the settlement of the estate. I desire to modify my expression a little by saying that your children shall draw in addition to the annuities, if such addition shall be found necessary, and if, as trustees for the

children, we have any power to make an allowance before the settlement of the estate. I am not quite certain what power we possess in this particular. At any rate, we shall do what ought to be done so far as we find we have power.

Very truly, yours, R. D. HUBBARD.

[Copy.]

EXHIBIT G.—E. E. MARVIN, *Examiner*.

HARTFORD, *Jan'y* 20, 1863.

MY DEAR MADAM: I have seen the other executors; they think some discrimination ought to be made between the youngest of your children and the others. They will be willing to allow $1,000 per annum for each of the elder children, and for the youngest at the rate, for the present, of $800. They very much hope
156 that you will be able to look upon this as satisfactory allowance. At the above rate I am authorized to pay the children in regular quarterly payments.

I am now engaged in court, but will, if you desire it, do myself the pleasure to call on you in regard to the matter.

Very truly, R. D. HUBBARD.

[Copy.]

EXHIBIT H.—E. E. MARVIN, *Examiner*.

HARTFORD, *May* 11, '66.

Mrs. COLT.

DEAR MADAM: Yours of yesterday is rec'd. The source of this last trouble is in the first decision made in favor of Judge Colt. That decision involved this as a logical necessity, though the court did not then know it. This decision reduces that to a logical absurdity. I always regretted that your family did not see fit to oppose Judge Colt's first claim. I expressed that regret more than once. If your family had joined others in opposing the judge's claim, I think this last result would not have happened. I could not be struck with the fact, that, after you had, by remaining silent, given much support to the judge's claim, he at last turned on you, and I have recently learned (with some regret) that you had to enter into a private arrangement with him. However, these matters are past, and there is little use in discussing them. But, I must add, that, to my mind, two things are as certain as that two and two make four: First, that Jas. Colt was not entitled to a share under the will; and next, that the very share which the court has given to him in the residuum, belongs to your children,—fire will not burn out this opinion. I defy any person who is not afflicted with
157 "judicial blindness" to come to any other conclusion upon any natural rule of interpretation. But, after the first error was made, the second came as a matter of inevitable necessity.

I don't think that any such change in the trust as you allude to could be brought about.

The estate will now be settled up speedily, and let me assure you, it will be settled up without one single cent clinging to any finger that has dealt with it.

I shall always be happy to do anything in my power for the advantage of the interest represented by y'r family.

Yours truly, R. D. HUBBARD.

[It is admitted that the brief annexed to complainant's bill, marked Exhibit D, was filed in the supreme court, in behalf of the executors, and that an oral argument was made thereon by Judge Seymour and Mr. Macfarland as their counsel.

C. E. PERKINS,
Counsel for Respondents.
SIMEON E. BALDWIN,
Solicitor for Complainants.]

LEBARON B. COLT, sworn:

I am one of the complainants; I reside in Bristol, R. I.; have lived there since 1874; I formerly resided in Hartford, Conn., up to April, 1866; I went to Chicago in 1870, and resided there
158 four years; I have not lived in Connecticut since April, 1866; I was born June 25, 1846; I did not employ any counsel to represent me in the James B. Colt suit, either in the superior or supreme court; I first saw a copy of the brief filed in that suit by the executors, Exhibit D, Dec. 27, 1878; I was personally acquainted with Gov. Hubbard, Mr. Jarvis, and Mrs. Colt, from about the time of the death of my uncle, Jan. 10, 1862; I was acquainted with Mr. Jarvis and Mrs. Colt for some time previous to that, while I resided in Hartford; I reposed confidence in their ability, and I especially reposed trust and confidence in Gov. Hubbard; during the pendency of the James B. Colt suit I was in Yale College as a student.

Cross-examined by Mr. PERKINS:

I knew of the pendency of the James B. Colt suit only from hearsay; I did not know of the times when the trials took place; I knew of the decisions after they were rendered; I was in college, but paid no attention to the matter, one way or the other, at all; I do not know whether I was served with process in that suit or not; I was not served with personal process to my recollection; I had no knowledge at the time that I was a party to the suit; I can't say that I knew that my interests were in any way connected with the suit; I heard some few weeks before the final argument that this point was raised in this case. When I say point, I mean this point as to the residuum on the 500 shares left by the second codicil; I do not know who told me; think my mother, or my brother Edward; I do not recollect who told me.

LEBARON B. COLT.

159 Subscribed and sworn to before me, this 3d day of April, A. D. 1880.

E. E. MARVIN, *Examiner.*

SAMUEL POMEROY COLT, sworn:

I am one of the complainants; I reside in Bristol, R. I.; I was born January 10th, 1852; I resided in Hartford and New Hartford, Conn., till April 20th, 1866, when I removed to Bristol, R. I., and have ever since resided there; I never employed counsel to represent me in the James B. Colt suit, either in the superior or supreme courts; while I lived in Hartford I knew the executors of Samuel Colt's estate, and I could add that I knew Mr. Hubbard very well; I had every confidence in them, especially in Mr. Hubbard, whom I liked very much, as he took a great deal of notice of me; I used to go with my mother to his office and see him there.

Cross-examined by Mr. PERKINS:

I knew that there was something called a suit brought by Judge Colt about the year 1865, but I had a very indefinite idea of what a suit was; I knew it was something about Col. Samuel Colt's will, but I paid no attention to it whatever.

SAM'L P. COLT.

Subscribed and sworn to before me, this 3d day of April, A. D. 1880.

E. E. MARVIN, *Examiner.*

160 Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH H. COLT *et al.* } In Equity.

Interrogatories annexed to commission under which the foregoing depositions of Frank E. DeWolf, and Isabella DeWolf Colt DeWolf, were taken.

Direct Interrogatories to be Propounded to Frank E. DeWolf, one of the Complainants in said Cause.

1. What is your name, age, and place of residence? Are you the husband of Isabella DeW. Colt DeWolf; and, if so, when were you married to her?

2. Are you one of the complainants in the above-entitled case?

3. State when you first received any information in relation to the brief, or any brief, filed by the executors of Samuel Colt,
161 through their counsel, in the suit brought by James B. Colt against Elizabeth H. Colt and others, in the superior court, Hartford, in the State of Connecticut, in the year 1864. How did you receive the information, and what was it?

4. Did you, on the 11th day of January, 1873, sign any receipts, or instruments purporting to be receipts which were given to the executors and trustees under the will of Samuel Colt? If so, state the circumstances under which such instruments were made and signed.

5. Did you ever receive any actual notice that the executors of Samuel Colt were about to file, or had filed, accounts of their administration of his estate in the probate court at Hartford, and that a hearing as to the approval of such accounts was to be had at any particular day?

6. Were you ever present at any such hearing in said probate court?

7. State the circumstances under which said receipt to the executors, dated Jan. 11, 1873, was given, and the subject matter for which said receipt was in fact given.

8. Had you any authority given to you by her to execute a release, as her attorney, on receipt of the cash that day paid you on her account by the executors, of all her claims under said residuary clause?

Cross-interrogatory to be Propounded to Frank E. De Wolf.

Cross-interrogatory No. 1. Referring to direct interroga-
162 tory 8. State whether you had any written authority of any kind from your said wife, to execute any release or settle her claims against said estate; and, if so, annex a copy thereof; and, if not, state whether or not your said wife did not give you a general authority to come to Hartford and settle her claims against the executors under said will as fully as she could do if present, without any limitations or restrictions.

Direct Interrogatories to be Propounded to Isabella De W. Colt De Wolf, one of the Complainants in said Cause.

1. What is your name, age, and place of residence? What are the names of your parents? Are you married; and, if so, when were you married, and to whom?

2. Are you one of the complainants in the above-entitled case?

3. Were you named one of the respondents in the case brought by James B. Colt against Elizabeth H. Colt and others, in the superior court, Hartford, in the State of Connecticut, in the year 1864?

4. State whether you appeared yourself in said case brought by James B. Colt, or employed, or caused to be employed, any counsel to appear for you and to defend your interest in said case,
163 either in said superior court, or on the trial of questions reserved, in the supreme court of errors of the State of Connecticut?

5. State whether, at the time of said suit, you had any acquaintance with legal business; and whether or not you understood that it was necessary for you to employ counsel to appear for you and defend your interests in said case.

6. Had you ever up to that time been a party to any suit at law or in equity, or been in any way connected with proceedings in court?

7. State whether, before or at the time of the hearings in said

case, you had any knowledge, and, if so, what, in relation to any brief filed therein by the executors of Samuel Colt, through your counsel.

8. State when you were first informed in relation to any such brief, and the filing thereof.

9. When were you first informed that the executors or their counsel had filed any brief in said case, denying the right of the children of Christopher Colt to any portion of the property given by the residuary clause of the will of Samuel Colt?

11. Did you ever receive any actual notice that the executors of Samuel Colt were about to file, or had filed, accounts of their administration of his estate, in the probate court at Hartford, and that a hearing as to the approval of such accounts was to be had at any particular day?

12. Were you ever present at any such hearing in said probate court?

164 13. Did you ever authorize your husband, as your attorney, to release said executors from all claims in your and his behalf under the residuary clause of the will of Samuel Colt?

Cross-interrogatories to be Propounded to Mrs. Isabella De Wolf Colt De Wolf.

Cr.-int. No. 1. Referring to direct interrogatory No. 4. State whether or not you knew at the time of said suit that the Hon. Henry C. Robinson, of Hartford, Conn., was employed to appear in said case and represent the rights of all the children of Christopher Colt, and that he did so appear; state where you were residing at that time, and who, if any one, was attending to your business affairs for you, especially with regard to this case?

No. 2. Referring to direct interrogatory No. 13. State whether or not you ever gave your husband any written authority of any kind to settle any claims you had against the executors under said will; and, if so, annex a copy thereof; and, if not, state whether you did not give your said husband general authority to come to Hartford and settle your claims against the estate in the same manner as you yourself could have done, if you had been present?

165 And on the 10th day of May, 1880, depositions of Frank E. DeWolf, and Isabella DeW. C. DeWolf, were filed, in the words and figures following, viz:

Depositions of Frank E. De Wolf and Isabella De W. Colt De Wolf, taken under a Commission issued April 6th, 1880.

Depositions taken and reduced to writing by William H. Vesey, at Nice, in France, commissioner duly appointed by virtue of commission issued by command of the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, in the said district, dated the sixth day of April, in the year

eighteen hundred and eighty, and directed to the said commissioner by Edwin E. Marvin, Esquire, clerk of the said court.

FRANK E. DEWOLF, being duly sworn:

1. To the first interrogatory, saith:

That his name is Frank E. DeWolf; his age is thirty-seven years; his place of residence is Bristol, Rhode Island, United States of America; that he is the husband of Isabella DeW. Colt DeWolf; that he was married on the twentieth of September, eighteen hundred and sixty-six.

2. To the second interrogatory, he saith:

Yes, he is.

3. To the third interrogatory, he saith:

That the first informatian he ever received in relation to any brief filed by said executors, or their counsel in said suit, was in January, eighteen hundred and seventy-nine, through a letter from his brother-in-law, Samuel P. Colt; that the information was to
166 the effect that the executors had filed a brief against the interest of the complainants, in the Connecticut court, in the suit brought by James B. Colt against Elizabeth H. Colt and others, in the year eighteen hundred and sixty-four.

4. To the fourth interrogatory, he saith:

That on the ninth day of January, eighteen hundred and seventy-three, he arrived at Hartford, Connecticut, coming from San Francisco, California, and on the morning of the tenth day of January, eighteen hundred and seventy-three, he went with his brothers-in-law, LeBaron B. Colt and Samuel P. Colt, to the office of Mr. R. D. Hubbard, in said city of Hartford, and they were there informed that Mr. Hubbard was engaged in court, and could not attend to their business; that they then went away and returned the following day, the eleventh day of January, to his office, and then from there they, Samuel P. Colt, LeBaron C. Colt, R. D. Hubbard, and the deponent, went to Colt's Armory, in said city of Hartford, where they met Mr. R. W. H. Jarvis in his office; that Mr. Jarvis then told them that the accumulations on the five hundred shares of stock of the Colt's Patent Fire-arms Manufacturing Company, which were held by the executors as trustees for the children of Christopher Colt (except the oldest son), amounted to the sum of one hundred and thirty-two thousand five hundred and thirty-six dollars and five cents, and after deducting five thousand five hundred dollars, which they, as trustees, took to pay themselves for their trusteeship, there remained one hundred and twenty-seven thousand and thirty-six dollars and five cents, and that the proportional share of this sum, of deponent's wife, was thirty-one thousand seven hundred and fifty-
167 nine dollars and one cent; and that her proportional share of the five hundred shares of the stock was one hundred and twenty-five shares. That Mr. Jarvis then gave him, this deponent, a check for thirty-one thousand seven hundred and fifty-

nine dollars and one cent, and a certificate for one hundred and twenty-five shares of the stock, and requested him to sign a receipt for that said sum, and the certificate of stock, which he, this deponent, did. That Mr. Jarvis then said that there was a further sum of two thousand, nine hundred and seventy five dollars and twenty-four cents, being a part of the general estate of Samuel Colt, which they held as executors, and which belonged to the complainants, and that the proportional share of deponent's wife was seven hundred and forty-three dollars and eighty-one cents; and for which he gave deponent a check, and requested him to sign a receipt, which he did. That deponent was acting for his wife, and as her attorney, and that she had requested him to go to Hartford and collect for her certain moneys and stock. That before leaving San Francisco to go to Hartford to attend to this business for his wife, he wrote to Mr. R. D. Hubbard, one of the executors and trustees, and informed him that his wife could not go to Hartford to receive these moneys, and that she had requested him to go in her stead; and he asked Mr. Hubbard to inform him by letter what papers he would require from himself and his wife in connection with the business; and that he received a letter from him, saying that he would require a power of attorney from his wife to himself. Then his wife then informed him that she had great confidence in Mr. Hub-
168 bard and Mr. Jarvis as her trustees, and that he might readily comply with any request that they might make in relation to the business. That no notice was given his wife or himself before he left San Francisco, or at any time either before or after he arrived at Hartford, that any receipts or discharges would be required in connection with this business; and the first intimation he had that such receipts and discharges would be required, was when Mr. Jarvis gave him the checks and the certificate of stock, and requested him to sign the receipts, which he did without any hesitation or examination, having in mind the great confidence reposed in the trustees by his wife and himself. That no mention was made by Mr. Hubbard or Mr. Jarvis, or any one, as to their signing away any of their claims against the estate of Samuel Colt, or against the executors or trustees; nor was he aware of the exact wording of the receipts until January, eighteen hundred and eighty, when he was informed by his brother-in-law, Samuel P. Colt; that his intention at the time of receipting was to receipt for the moneys and stock, which, by right, belonged to his wife and coming to her at that time, and it was not his intention to sign any receipts or discharges releasing any claim or claims that his wife might have against the estate of Samuel Colt, or against the trustees or executors, or any claims that she might have to the residuary stock or under the residuary clause of the will of Samuel Colt; and the claims of himself and his wife under the residuary clause of said will did not enter into or form a part of the transaction, and were not included in or covered by the receipts or instruments, and that the receipts only related
169 to the amount of five hundred shares of stock and the accumu-

lations thereon, and to the property, estate, and money, coming to them from Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, strictly as executors for and on account of the legacies, annuities, and devises, in and by said will given directly to them, and not to any stock or property whatever therein bequeathed to their trustees, as trustees for them under the residuary clause of said will. That the executors made no explanation to them as to their rights under the will and codicils, or that they had any further rights thereunder than to receive the aforesaid amounts and stock; and that the fact set forth in the receipt that the executors and trustees then settled and accounted with each of them for all claims of any kind which they had against the estate of Samuel Colt, or against the executors and trustees, is not true, for that it was not suggested or mentioned by any one that the receipts were intended for any other purpose than to receipt for the moneys and stock actually due them at that time. That furthermore, in the month of April, eighteen hundred and seventy-five, the executors paid over to his wife, the further sum of one hundred and thirty-eight dollars and thirty-four cents, coming to her from the estate of Samuel Colt, and that the receipts given on the eleventh day of January, eighteen hundred and seventy-three, were not given in final settlement of any claims against said estate; that they were signed in a careless and hasty manner, on account of the great confidence they had in the trustees and executors; that so great was this confidence that an account current of the doings of the trustees, which they presented
170 at that time, was not examined, and was taken for granted to be correct, and remains unexamined to this day by his wife and himself; that the foregoing statement which he has made is based upon a diary which he kept at that time.

5. To the fifth interrogatory, he saith:

That he did not receive any notice of the filings of any accounts, nor of any hearings upon the same, nor did he know that any accounts had ever been filed in the probate courts until after January, eighteen hundred and seventy-nine.

6. To the sixth interrogatory, he saith:

That he was not present himself, nor did he authorize any one to represent him in any proceedings in the probate courts.

7. To the seventh interrogatory, he saith:

That the circumstances under which the receipts were given are fully described in his answer to the fourth interrogatory, and that his statements are based upon a diary which he kept at that time, and which he now has in his possession; that he is in the habit of keeping a diary, and that the circumstances attending the signing of the receipts are as clear in his mind as though they occurred yesterday; that the moneys which he received on the eleventh day of January, eighteen hundred and seventy-three, as he has already said in his reply to interrogatory No. 4, were moneys due and coming to his wife at that time, and that the receipts which he signed were receipts for those moneys due her at that time, and that the

receipts were not given in final settlement of any claims they might have against the estate of Samuel Colt, and that they did receive a further sum of one hundred and thirty-
171 eight dollars and thirty-four cents, in April, eighteen hundred and seventy-five, from the said estate, which sum was paid to them by the executors; that they did not then claim, and never have claimed, that the receipts signed on the eleventh of January, eighteen hundred and seventy-three, were given in final settlement of their claims against the estate, or against the executors and trustees; that the residuary stock belonging to them, or their proportion thereof, or their interest and right therein, or that of the trustees, did not in any way enter into or form a part of the transaction, and were not included in or covered by any or either of said receipts, but that the said receipts relate to, and did relate only to, the amount of five hundred shares of stock, and the accumulations thereon, referred to therein, and were not intended to release their claims and rights to anything more or further; that neither Mr. Hubbard nor Mr. Jarvis nor any one else made any explanation to them of their rights under the will and codicils of Samuel Colt, or that they had any further rights thereunder other than to receive the amounts aforesaid; and that he had no previous notice of or previous knowledge that any receipts whould be asked for; that the said receipts were signed without deliberation, and without time or opportunity therefor, and without full and competent knowledge on their part of their claims, rights, and interest under said will and codicils, and in ignorance of the course pursued by the trustees in the proceedings in the courts of Connecticut, in filing a brief in opposition to their own rights, interests, and claims under the said will and codicils, to them belonging and appertaining as trustees of his
172 wife and himself, and in opposition to the rights of the complainants as *cestuis que trust*, and in ignorance of the manner in which said judgment had been obtained; that he reposed great confidence in the said Hubbard and Jarvis, and had always been accustomed to repose such confidence in them; that he was inclined to easily and readily comply with any request or direction from the said Hubbard and Jarvis in relation to the making of any instruments or receipts which they might indicate as being necessary or proper; that no allusion or reference was made in any way to said residuary stock, nor was it suggested or intimated that said instruments would ever be claimed to be a release or discharge of the rights of the complainants, or of their trustees therein, or any part thereof, nor did he intend to make such a release or discharge; and that the instruments cover only the amount of stock, property, and money actually transferred and paid over to the complainants, and without any other or further consideration therefor.

8. To the eighth interrogatory, he saith:

That he had full authority from his wife to act as her attorney and to receive the cash coming to her at that time, and to give a receipt for the same, but that her claims under the said residuary

clause of the will were not referred to, and did not enter into or form a part of the transaction.

1. To the first cross-interrogatory, he saith:

That he had a full power of attorney to represent his wife, and to act for her as though she were there in person, without any limitations or restrictions.

F. E. DEWOLF.

173 Sworn to and subscribed before me, at Nice, this twenty-fourth day of April, eighteen hundred and eighty.

[SEAL.] W. H. VESEY, *Commissioner.*

ISABELLA DEW. COLT DEWOLF, wife of Frank E. DeWolf, being duly sworn.

1. To the first interrogatory, she saith:

That her name is Isabella DeW. Colt DeWolf; her age is thirty-nine years; her place of residence is Bristol, Rhode Island, United States of America; that the names of her parents are Christopher Colt and Theodora Guijand DeWolf Colt; that she is married; that she was married on the twentieth day of September, eighteen hundred and sixty-six; that she is married to Frank E. DeWolf.

2. To the second interrogatory, she saith:

Yes.

3. To the third interrogatory, she saith:

That she supposes so, but that she does not know positively.

4. To the fourth interrogatory, she saith:

That she did not appear herself, nor did she employ, or cause to be employed, any counsel to appear for her in said case in either of said courts.

5. To the fifth interrogatory, she saith:

That she had no acquaintance with legal business, and did not understand it was necessary to employ counsel, because she thought the whole matter was in the hands of the executors, and that they would do all that was necessary to protect her interests.

6. To the sixth interrogatory, she saith:

That she had not.

174 7. To the seventh interrogatory she saith:

That she had no knowledge whatsoever of any brief of any kind filed by the executors through their counsel.

8. To the eighth interrogatory, she saith:

That she was first informed by her husband.

9. To the ninth interrogatory, she saith:

That she was first informed in January, eighteen hundred and seventy-nine, by her husband.

11. To the eleventh interrogatory, she saith:

That she did not receive any notice of the filings of any accounts, nor of of the hearings upon the same, nor did she know that any accounts had ever been filed in the probate courts until after January, eighteen hundred and seventy-nine; that she moved from the

State of Connecticut in the month of April, eighteen hundred and sixty-six, and has ever since resided out of said State.

12. To the twelfth interrogatory, she saith:

That she was not present hereself, nor did she authorize any one to represent her in any proceedings in the probate court.

13. To the thirteenth interrogatory, she saith:

That her husband had full authority to act for her, but that her claims under the residuary clause of the will did not enter into or form a part of the transaction.

1. To the first cross-interrogatory, she saith:

In reference to direct interrogatory No. 4, that she did not know at the time of said suit that the Honorable Henry C. Robinson was employed to appear in said case, nor did she know that he appeared in said suit, nor did she know that he represented the rights of any of the children of Christo-
175 topher Colt in said case, nor did she know that he so appeared for any of the children of Christopher Colt in said case; that at the time said suit was pending she was residing in Hartford, Connecticut; that she removed from Hartford, Connecticut, in April, eighteen hundred and sixty-six, and that she has ever since resided out of said State; that Mr. W. H. Jarvis, one of the trustees under the will of her uncle, Samuel Colt, had attended to her business generally, and particularly in connection with this suit, and that he had always said to her in the various interviews she had with him that he would protect her interests and advocate her claims in said suit.

2. To the second cross-interrogatory, she saith:

In reference to direct interrogatory No. 13, that she gave her husband general authority to represent her in Hartford, and to act for her as though she had been there in person; that he had full power to act for her as though she had been there in person.

ISABELLA DEWOLF COLT DEWOLF.

Sworn to and subscribed before me, at Nice, this twenty-fourth day of April, eighteen hundred and eighty.

[SEAL.] W. H. VESEY, *Commissioner.*

176 And on the 24th day of September, 1880, defendants' evidence was filed, in the words and figures following, viz:

United States Circuit Court, District of Connecticut.

LEBARON B. COLT and others
vs.
ELIZABETH HART COLT and others. } In Equity.

Defendant's Evidence.

177 United States Court Circuit, District of Connecticut.

LEBARON B. COLT and others
vs.
ELIZABETH HART COLT and others. } In Equity.

Testimony taken before E. E. Marvin, Examiner, on behalf of the Defendants, at Hartford, August 27, 1880.

Present: Messrs. Paine, Ashley, and Colwell, for complainants; Messrs. Perkins and Hyde, for defendants.

H. C. ROBINSON sworn:

1. What is your name, age, residence, and occupation?

Answer. Henry C. Robinson; age, 47; residence, Hartford; occupation, lawyer.

2. Were you connected as counsel with the case of James B. Colt against E. H. Colt and others, executors of the will of Samuel Colt, in the superior and supreme courts of this State, about the years 1864, 1865, and 1866; and, if so, state what connection you had with the case, for whom you acted, by whom employed, and by whom you were paid?

(The complainants object to this question, as too general, calling for matters which, though responsive to the question, may not be competent in the case.)

A. I was counsel in the case for Samuel C. Colt, and for
178 the children of Christopher Colt, and I acted for all these parties. My employment for Samuel C. Colt was by himself; my employment for the children of Christopher Colt was originally for a broader field than the single case referred to, but included it. I was originally retained in February, 1864, for the children of Christopher Colt in all matters involving their interest in the estate of Col. Colt. The first member of the family who retained me was Edward D. Colt, the eldest son interested in the estate I speak of, who was then in active business, although a minor, in Hartford, and who retained me for his father's children.

(Complainants object to the latter statement, until the authority of Edward D. Colt to represent the other children is shown.)

His employment was afterwards ratified by Mrs. Theodora D. W. Colt, guardian of the minor children of Christopher Colt, and was well known to and approved by his younger brothers in the progress of the case mentioned in the question.

I was paid, on account of all the children, by Edward D. Colt my fees in the case of Colt *vs.* Colt. Let me say here, in parenthesis, that my retainer had no reference to the oldest daughter, Isabella. She was expressly excepted in the original retainer.

3. Will you now state more in detail what you did in the above-named case for the children of Christopher Colt; whether you appeared in the case, was present at the several hearings in it, and what part you took in them?

A. When I was originally retained to act for the children, the controversy between Judge Colt and the estate had developed, but had not taken the form of civil process, and did not for some months afterwards; Edward advised me that the course of his father's fam-

ily, in reference to that proposed litigation, had not been fully decided; that Judge Colt was anxious for the assistance of Christopher Colt's family, which assistance would be against their pecuniary interest; that the family would have a consultation in the matter, and would finally instruct me what course to take in reference to the suit at a proper time; he came in with the copy of process when it was served, and advised me that the family wished me to make an appearance, but neither to support or oppose in their behalf Judge Colt's claim to residuary stock.

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I think my first interview with Mrs. Christopher Colt was just before the service of Judge Colt's petition; it may have been just after. I obeyed the instructions. The case came to a trial on demurrer in the superior court. I had entered an appearance there for the minor children of Christopher Colt just before the demurrer was argued in the superior court. Mr. Macfarland, of counsel for the estate, called upon me and insisted that in his judgment the children of Christopher Colt had an interest larger than their share in Judge Colt's interest in the residuary stock, and that the amount coming to them under the codicil was very likely to be unfavorably affected by the overruling of the demurrer. This I communicated to Edward D. Colt, who still refused to allow me to act for himself and brothers against the claims of James B. Colt, placing it upon the grounds of the superior advantages of family harmony, and the feeling of James B. Colt in the matter.

I took no further action in the case until the case returned to superior court after the first decision of the supreme court on the demurrer. Then the question distinctly arose as to the extent of their (the children of Christopher Colt) interest in the stock, on account of the gift in the codicil. To the protection of their interests, to the fullest extent, I labored with my best ability.

The case was not argued below; that is, in the superior court, but was argued in the supreme court. The former decision was unfavorable to our claim, but I made such points as I could best raise; the three points which I urged are still in my memory, although I can find no brief of them, and although I did file a brief in the supreme court at the time. I have lost a number of my briefs in that litigation, including the original brief of Mr. Perkins and Chapman, and the original brief for the estate, and my own brief for Samuel C. Colt on the demurrer.

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The points which I remember now, fourteen years after made, were these: First, that a substitution which should be excluded from the larger share of the benefits conferred upon that gift for which it was substituted, would be almost an absurdity, and obviously against the intention of the testator. Second, that if the interest in the residue was confined to the persons and parties to whom, as persons and parties, the legacies had been "hereinbefore given," then decency and strict law would allow, and perhaps compel, a court to treat the gift as a gift to the holders of the legal estate as persons and parties, and to treat the changes

in the will as a mere diversion of the trust. Third, I assumed that the gift to the executors would go to Jarvis, and not to Deming, and tried to form a strong analogy in favor of the soundness of the last point. Of course I cannot remember the whole scope of my argument, but these three striking points remain in my memory. I cited in my brief authorities which I found as pertinent to the points which I raised, and I looked for authorities as I best could. I endeavored also to get counsel upon both sides of the controversy to acquiesce in our claims without a contest. Mr. Chapman, with whom I had been associated in another case for the minor children of Christopher Colt under the will, was of counsel for James B. Colt, and I tried to get him to abandon their attack upon our interest in the residue on account of the gift in the codicil. I also tried to get Mr. McFarland to take the same course. Both parties argued against my claim, the counsel for James B. Colt citing a large number of authorities, and the counsel for the estate citing one; both counsel citing an ugly case that I remember, in the 9th of Simons. Samuel C. Colt expressed a willingness to have the children of Christopher Colt succeed.

(The complainants, by consent of respondents' counsel, reserve all legal [—] objects to the above answer, and especially to so much thereof as consists of statements made to the witness by other parties, and of the statements and acts of Edward D. Colt, claiming to represent his brothers.)

181 4. In your answer to the last question, you speak of another suit in which you were concerned for the minor children of Christopher Colt, in connection with this will. Will you state the nature of that suit, for whom you appeared in it, what connection you had with it, and by whom you were retained and paid?

(The complainants object to the question, as calling for matters irrelevant to any issue in this case, and also as calling for a statement by the witness of the nature of a suit of which the record is the best evidence.)

A. Soon after I was retained for Christopher Colt's children, I devoted myself very assiduously to ascertaining the extent of their interest in the estate; I soon found that a question would arise as to their rights to dividends declared intermediately between the death of the testator and the majority of the several beneficiaries upon the stock given to those minor children in the original will; these dividends had been and were likely to be large; I at once made a demand upon Mr. Hubbard for these dividends; he declined to pay them at the time, and said he would look at the matter; he shortly afterwards told me that he had examined the question, and was of the opinion that the stock did not vest at all until the majority of the several beneficiaries; I then arranged with him that we would get the opinion of the supreme court upon it so soon as

Edward became of age, and that the result of that suit should govern the interests of the other children. An amicable suit, in which the facts were all agreed upon was made, and reserved by the superior court for the advice of the supreme court, and was argued the day after the other case to which I have alluded; this case is reported in 33 Conn. Rep., p. 281; Mr. Chapman was with me in this case; he came into it just before the argument, after his success in the other case. The point raised on the primary legacies was decided according to Mr. Hubbard's view, but the construction given to the will by the supreme court in the demurrer case of the James B. Colt case assisted me so that I was successful in getting the dividends upon the stock attaching to the primary legacy in the residue.

182 My fees in this case were paid partly in July, 1866, by Edward D. Colt, and partly by Mrs. T. D. W. Colt, guardian, on Jan. 6, 1867. This last payment covers, however, my services for the minor children in the other matters connected with the estate besides both of these two suits. In January, 1867, Mr. Hubbard paid the amount due as the result of this suit. Edward's share was smaller, and a separate check was made for that. The amount coming to LeBaron B. Colt and S. Pomeroy Colt was $34,864.84. This was paid to me as attorney for Mrs. T. D. W. Colt, their guardian. On the same day I gave to her my check, which I here produce, for $32,364.84, reserving $2,500 on account. The check is misdated in 1866; it should have been 1867.

(Check referred to placed in evidence, and marked Defendants' Exhibit 1.)

The amount of my fees had not been then agreed upon in the dividend suit and for my services connected with the distribution of the estate, and the settlement of the executors' and trustees' accounts. I left it, however, at this time for the family to decide, giving it as my opinion that the amount which I had retained was about right. Afterwards, on the twenty-third day of April, 1867, Edward Colt called upon me, and said that they had talked it up in the family, and, while they thought the amount that I had retained was not large, if I chose to deduct $250 from the amount retained, it would be altogether satisfactory to them all. I then drew my check to Mrs. Colt's order for the $250 and settled the account. That check I produce.

(Check produced by witness placed in evidence, and marked Defendants' Exhibit No. 2.)

5. Will you state the amount of your charges in the James B. Colt suit, and when and how they were paid?

A. In July, 1866, Edward D. Colt paid me for himself and his brothers $2,000, $1,000 in full of services in case of Colt *vs.* Colt, and $1,000 on account of suit of Colt *vs.* Hubbard. The clerk of the supreme court had then been advised to give judgment against us generally in the case of Colt *vs.* Hubbard. I had moved for a re-

argument, on the ground that the dividends on the residuary
183 stock must belong to us, and that the estate had at the trial almost abandoned their defence as to these dividends. It was agreed that, if I should be unsuccessful in that application, the $1,000 should substantially pay me for services in that case; but, if I succeeded in getting the advice changed in our favor upon the residuary stock, they should be largely increased. I did succeed.

6. Will you state whether or not during the progress of the James B. Colt case Mrs. Theodora DeWolf Colt had knowledge that you were acting in that case in her behalf as guardian for her minor children, and for the children, and whether or not she at any time conferred or consulted with you about the case?

(Complainants object to this question, as calling for matter irrelevant to any issue in this case.)

A. I am of the impression that Mrs. Colt spoke to me several times in the course of the litigation in reference to the case. I recollect distinctly speaking with her at the time to which I have already alluded, when she congratulated me or herself (I forget which,) or perhaps both of us upon my being her counsel, and said that it was her fist experience in law, or almost her first experience in law, I do not now recollect distinctly which. She told me that Edward had advised her that he had retained me in her children's matter.

7. Will you state whether or not the minor children other than Edward knew of or talked with you about your acting for them, or management of the case, or conferred with you at any time about the same?

A. They knew of my acting in the case, and LeBaron talked with me about it in Pomeroy's presence. I am very strongly of the impression, and I think Pomeroy was in the supreme court room when a part of that case was argued, and that LeBaron, within a few hours after my argument, expressed to me his regrets that he had been unable to hear it, giving me some reason which I now forget.

8. Will you now state what connection, if any, with the settlement of the first account of the executors of the estate of S. Colt, and the distribution of the estate made thereafter, and for whom you acted therein?

184 A. I acted in both these matters for Samuel C. Colt and the children of Christopher Colt, and including Isabella, I think.

I examined the executor's accounts; I think they were handed to me in advance by Gov. Hubbard; as I now remember the will, although I have not looked at it in that part for a good many years, my clients and Mrs. E. H. Colt and Caldwell, as legatee and heir-at-law of a small intestate fraction, were the only beneficiaries of the residuary estate, excluding the stock. The only item disputed in any of the accounts was the amount of executor's fees, which

were larger as presented than prescribed by the will as indicated by the first inventory; I submitted this question to Samuel C. Colt and Edward D. Colt, and, I think, LeBaron B. Colt, but am not sure; they acquiesced in the increase; there was also one other item of allowance to Mrs. E. H. Colt, which involved, I think, an addition to the family residence contemplated or begun in the life of the testator, which was a subject, I will not say of discussion, but of explanation, and was assented to; I don't remember any other items which needed any serious explanation. In the matter of distribution Mr. Hubbard asked me to name the distributors; I named two of them—Mr. Tiffany and General Waterman—and think that I insisted that the executors should name the third, and they named N. H. Morgan.

I was with the distributors, and made personal examination of all the property to be distributed, which was very large and very largely real estate; I do not recollect that anybody appeared for the estate before them, except that Mr. Jarvis or Mr. Merritt went over to point out some property on the east side of the river. The executors furnished all proper maps, vouchers, and descriptions, and we went on to all the pieces of property; the executors were not present; I also acted for these children of Christopher in the settlement of the other executor's accounts, of which there were two more, and in the matter of the trust of the 500 shares of stock in the codicil. In this latter matter I made frequent applications to Mr. Hubbard for enlarged allowances to them at their and,
185 I think, at Mrs. T. D. Colt's request. I also acted for them in conjunction with LeBaron, who was then himself a lawyer, in the final settlement of the trustees' and executors' accounts, about the time of Pomeroy's majority (I think just after). I recollect of seeing Mr. DeWolf, Isabella's husband, at that time, in Mr. Hubbard's office, which was the first and only time that I recollect to have seen him.

9. Will you look at the paper now shown you and state whether it is in your handwriting and signed by you; whether you was duly authorized to sign it, and for what it was given?

A. The paper is in my handwriting. I have no present recollection of the transaction. I should not have signed it unless I was authorized to do so, nor for any other purpose than that indicated in the body of the writing. I do recollect that LeBaron B. Colt made a very comprehensive power of attorney on the eve of his sailing for Europe, or just before his sailing for Europe; my books will show the disposition of the money.

(Defendants' counsel placed in evidence the paper referred to, which is marked Defendant's Exhibit No. 3.)

19. Will you state whether or not you were present at the final settlement between the children of Christopher Colt and the executors, on the 11th day of January, 1873, whether you signed a release or discharge to the executors on behalf of Mrs. Theodora

D. W. Colt at that time, and whether you had authority, and what, so to do.

A. I remember being present at the settlement, and remember procuring at Mr. Jarvis' solicitation a power of attorney from Mrs. T. D. W. Colt, as assignee of E. D. Colt's interest in the estate, for some purpose or other; the paper now shown me is that power of attorney. I have no present recollection of this transaction or signing the receipt referred to. I have not the slightest doubt of it, but do not recollect it. I cannot explain the fact that the paper is dated the 14th day of January, but I think I must have sent it to Mrs. T. D. W. Colt to subscribe at some previous time, but that it had not then been subscribed and returned to me. The body of the power of attorney is in my handwriting; the date is not.

186 (Counsel for defendant place in evidence the paper referred to, which is marked Defendants' Exhibit No. 4.)

11. In what form you made your charges for services in case of James B. Colt against the executors, and in case of Edward D. Colt *vs.* Hubbard and others, and the other matters which you have spoken of, and for your services before the probate court in settling the accounts of the executors and trustees?

(Complainants object to the question, as irrelevant.)

A. The original charge, February, 1864, and all the charges, except as I make a qualification afterwards, are "to Christopher Colt's children." The dividend suit appears by itself in 1865 as "Edward D. Colt for himself and others."

(Deponent wishes to vary his answer to question 3 by saying that his interview with Mr. Macfarland was after the argument in the superior court, and before the argument of the demurrer in the supreme court.

Also, to vary his answer to question 8 by saying that the conversation in the probate court at the rendering of the executors' account relating to the amount of executors' fees was with LeBaron B. Colt, and the conversation with Edward D. Colt, related to the allowance to the widow.)

Cross-examined by Mr. PAINE:

X 12. Were you present when the so-called receipts and discharges referred to in the respondents' answer under date of January 11th were executed by Samuel P. Colt and LeBaron B. Colt and F. E. Wolf, as attorney for his wife, Isabella C. DeWolf?

A. I do not remember the fact of seeing these receipts executed; I see that I participated in them as attorney for Mrs. Colt; I also remember of going to the armory to execute some paper; what paper I do not remember.

X 13. Are you positive that you executed these receipts and discharges as attorney for Theodora D. W. Colt at the same time that the other parties to them executed them?

A. I have no recollection at all of the execution of them as
187 a fact; if I had the original receipts they might or might not refresh my recollection; one thing makes me think that I was not present with all the signers, and that is, that I don't remember ever to have seen Mr. DeWolf outside of Gov. Hubbard's office, and I understand Mr. Colt to say that these were executed at the armory.

X 14. The power of attorney under which you signed these receipts produced in evidence bears date January 14, 1873, and was acknowledged on that day in Bristol, R I. Did you not, after the receipt of that power of attorney, go to the armory and subscribe the receipts and discharges bearing date January 11, 1873?

A. It is quite possible. I have no recollection of the fact one way or the other.

R.-D. 15. Before those receipts were signed, will you state whether or not you, as counsel, examined the account of the trustees of the children of Christopher Colt prepared by Mr. Hubbard and others and agreed as to the amount of compensation to be paid them; and, if so, who were present?

A. I remember of examining the accounts at Mr. Hubbard's office, his inner office, in presence of Gov. Hubbard, LeBaron B. Colt, S. Pomeroy Colt, and Mr. DeWolf. I remember that I relied very largely and chiefly upon LeBaron's examination, which he had made quite at length before that time. I also remember retiring with the Colts and DeWolf from Gov. Hubbard's presence and discussing the amount of compensation, and that the rest of us had very hard work to induce Mr. DeWolf to agree to a compensation to the trustees that LeBaron, Pomeroy, and I thought fair; and that is about all I remember about it. It was, however, finally agreed to.

HENRY C. ROBINSON.

Subscribed and sworn to before me, this 27th day of August, A. D. 1880.

E. E. MARVIN, *Examiner.*

188 Mr. HUBBARD sworn:

1. What is your name, age, residence, and occupation?

A. My name is Richard D. Hubbard; my age is 62 years; my residence is Hartford; and occupation is that of counsellor-at-law.

2. Were you one of the executors of the will of Samuel Colt?

A. I was.

Adjourned to September 7, 1880, at 10 a. m.

HARTFORD, *September* 7, 1880.

Parties present as heretofore.

Testimony of Mr. HUBBARD resumed:

3. State your connection with the suit of J. B. Colt against you and others, the object of that suit, how far it affected the interests of these petitioners, who, if any one, acted as counsel for them,

and what transactions relating to it you had with Mrs. Theodora D. W. Colt, their guardian, relating thereto?

(Complainants object to the question so far as it relates to matters of which the record is the best evidence, and matters of hearsay and *res inter alios.*)

A. A very considerable part of the estate of Col. Samuel Colt, the testator, consisted of the capital stock of the Colt's Patent Firearms Manufacturing Company. Something less than half of this entire capital stock was given in the will to several primary legatees, in specified numbers of shares. Amongst others, 500 shares to James B. Colt, his brother, sometimes called Judge Colt; to him for life; remainder to his children. All the balance of the stock not given as above stated was bequeathed to the primary legatees in the ratio and proportion of their primary stock
189 legacies. By the first codicil to the will the 500 shares given by the original will to said James B. Colt for life, remainder to his children, was revoked and annulled. After the will was proved, and soon after administration commenced, the said James B. Colt made claim to the executors that the revocation in the codicil took away his right to the primary legacy of 500 shares only, and not to the residuary legacy attached thereto. This claim the executors resisted. He brought suit in the State courts to enforce this claim.

At this time the children of Christopher Colt (all except the eldest, I mean) had a very large interest in resisting the claim of Judge Colt, inasmuch as they took under the will, first, by the original will a legacy of 100 shares of stock each (400 shares in all,) and a still larger residuary interest in respect to the primary legacy of 100 shares each; second, by the codicil a legacy of 500 shares, which by the original will was given to the executors in trust for the children of Judge Colt, was revoked by the codicil, and by the codicil given to the executors in trust for the children of Christopher Colt, with accumulations, till the youngest become of age.

The claim of Judge Colt was raised on demurrer to the bill. Whilst the demurrer was pending, or before, I cannot say which, I sought an interview with Mrs. Christopher Colt, who was then guardian of her minor children. I told her that I had heard she and her children were in combination with Judge Colt to sustain his claim, and that if this were so, I thought she and they were acting in direct hostility to their own interests. She said in reply that the family had consulted in the matter, and they did not wish to be considered in opposition to Judge Colt's claim, as Judge Colt was an uncle of the children, and if the court concluded to give Judge Colt an interest in the stock they had no objections. I said to her if the Judge's claim shall be sustained, it will be very damaging to the interests of your children, and whilst I have no right to dictate advice, I fear it will be found in the end that you have made a mistake I had been informed by her

or some of the family, I cannot now state by whom, that Mr. Henry C. Robinson was the counsel for Mrs. Colt, and
190 her children in respect to their interest in the will. I also spoke to Mr. Robinson about acting on behalf of Mrs. Colt and her children in the argument of the Judge's claim upon demurrer. Mr. Robinson informed me that he was their counsel, but was not authorized to oppose the Judge's claim. The Judge's suit was brought June 1, 1864, and argued and decided, if my memory serves me, February, 1865. Mr. Robinson did not act in the argument of the case. The result of the judgment on demurrer established the Judge's right to his residuary interest in respect of his revoked legacy of 500 shares; how large an interest he had depended on future determinations in the cause. In order to fix the measure of his interest in this residuary share, it became necessary to determine the amount of the several primary stock legacies, in order that the residuum for apportionment might be ascertained, and, amongst other things, to determine the interests of Christopher Colt's children—whether they took or not a residuary stock legacy in respect of the 500 shares given them in the codicil in trust.

When the case broke in such form that the interests of Christopher Colt's children in the residuary legacy came into jeopardy, I put myself into communication with Mrs. Christopher Colt, explained to her the situation, and told her that there might be serious danger to the interests of her children, and asked her what course she desired should be taken for the protection of their rights in the determinations which were about to be made in the cause. She informed me that she had not the largest confidence in the executors, though she was so kind as to say, that so far as I, personally, was concerned she had no ill feeling or distrust. I told her, that, so far as I knew, there was no ill feeling on the part of any of the executors to her children, or to their interests under the will. She replied that she did not wish to discuss that matter with me further; that Mr. Henry C. Robinson was the counsel of herself and children, and would act for them in the determinations which were about to be made in reference to their interests,
191 and that, considering the relations which were existing, the family preferred to have their own independent counsel for the maintenance of their rights.

I ought, perhaps, to have said that after judgment in the suit on demurrer, the facts, with reference to the several interests of the stock legatees necessary for judicially determining the measure of these interests were found by the court, and the case reserved for the advice of the supreme court of errors. Mr. Henry C. Robinson acted in the matter of the findings, and also in the argument of the the question for the children of Christopher Colt, both in the superior court and the supreme court of errors.

A decision was made by the supreme court in respect to the

number of shares, primary and residuary, of the several stock legatees.

I, myself, whilst the question was pending, and before argument, took the trouble to have friendly consultations with Mr. Robinson in respect to his case, and made such suggestions as occurred to me, as a lawyer, in aid of his points.

4. Will you state whether or not there was another suit affecting the rights of the petitioners under said will; and, if so, state what it was, who acted as counsel for the petitioners in this case, or any of them therein, what agreements in reference to the interests of the petitioners in this suit were made by you with him in reference to the estate, and what was the result of said suit?

(Complainants object to the question, as irrelevant, and as calling for matters of which the record and certain written documents are the best evidence, if any there be.)

A. In 1865, after the decision in the Judge Colt case upon the demurrer, Mr. Robinson came to me professing to act for the children of Christopher Colt as one of the executors, and said that he thought the children were entitled to dividends from the death of the testator on the primary legacy of 100 shares given them in the will, and also in their residuary stock interest in respect of the primary legacy. I replied to him that it seemed to me a doubtful question, and that the executors could not safely concede his claim until the question was judicially settled.

192 Knowing that Edward D. Colt was soon to become of age, I said to Mr. Robinson, that when Edward D. Colt became of age I would consent to an amicable case between him and the executors for the purpose of determining the question suggested, provided he was authorized to agree, and would agree, in behalf of the minor children, that whatever determination was made in the amicable suit should be binding upon the minor children. He said he was authorized to agree for them, and would agree for them that the rule applied in the suit of Edward D. Colt should govern in the case of each of the minor children, LeBaron B. and S. Pomeroy Colt. Upon the faith of this agreement, after Edward D. Colt became of age, which, I think, was May 28, 1865, the executors and Edward D. Colt made up an amicable suit for determining the question to which I have above alluded.

This suit was brought in July, 1865, I think, and decided in 1866.

By that decision, as I remember it, dividends were denied on the primary legacy of 100 shares each, but allowed on the residuary stock legacy attached to the primary.

After that decision was made, the executors paid not only to Edward D. Colt the dividends in respect of his residuary interest, but also, soon after, to Mrs. Christopher Colt, as guardian to LeBaron B. and Samuel Pomeroy Colt, the sum of $34,864.84 on account of dividends accrued upon their residuary stock interest; and from

time to time thereafter, until LeBaron became of age, paid over to her, as guardian for him, the dividends subsequently accruing on this same residuary interest; and also to her, as guardian for Samuel Pomeroy, the dividends subsequently accruing on his residuary interest until 1873, when he became of age.

These dividends to Mrs. Christopher Colt, as guardian, I should not have paid, except that I supposed that Mr. Robinson had authority to make the agreement that the rule judicially applied to the case of Edward D. Colt, who was of age, should be binding upon the executors and LeBaron B. and Samuel Pomeroy Colt, these latter being minors.

5. State whether or not, after these decisions in the supreme court, the executors filed their first account relating to the
193 settlement of Samuel Colt's estate and had a distribution thereon; and, if so, with whom you consulted in respect thereto on behalf of the children of Christopher Colt, who acted for them before the court of probate, and whether or not such settlement of account and distribution was made in accordance with and relying upon such decisions?

(Complainants object to this question, for the same reasons that they objected to the previous question.)

A. On the 2d of July, 1866, as nearly as I can now state, the first executors' account was settled and accepted by the court of probate; before lodging it in the court of probate, I took it bodily to the office of H. C. Robinson as acting counsel for the children of Christopher Colt, showed it to him, explained it to him, and left it with him in his office for examination and criticism; it remained there several days before it was acted upon by the court of probate; I had several conferences with him after it was presented and before it was accepted by the court of probate in regard to topics involved in the account; some of these conferences were out of court and some in the presence of court when the account was acted upon by the probate judge; that account, as finally accepted by the court of probate, was accepted in his presence, and not only in his presence, but with his consent as counsel for the children of Christopher Colt.

After the acceptance of the executors' account, showing a very large body of the estate, real and personal, for distribution, the court of probate ordered distribution by officers of the court appointed by the court and known amongst us as distributors. Mr. Robinson, acting as counsel for the children of Christopher Colt, agreed with myself upon the appointment of the distributors, I offering to allow him to name the whole; he, however, in fact, naming only two and I the third. The distribution was made on the 14th of July, 1866. I furnished to Mr. Robinson maps of the real estate, inventories of the personal estate, and all the data of fact known to me, to enable him to act with intelligence for his clients

in the matter of the distribution. He acted for them in that matter.

194 The personal estate distributed to the children of Christopher Colt, namely, Isabella D. W. Colt, Edward D. Colt, LeBaron B. Colt, Samuel Pomeroy Colt, was paid over to them after the distribution, and the receipts I here present were given.

(Receipts shown are placed in evidence, and marked, respectively, Defendants' Exhibits No. 5^1, No. 5^2, No. 5^3, and No. 5^4.)

The executors' account to which I have referred, and all supplemental or additional accounts and the distribution until the estate was closed, were made and stated upon the rules furnished by the decisions of the court in the causes before referred to.

6. State what additional accounts were filed by the executors in said court of probate, what notice, if any, you gave to the children of Christopher Colt thereof, with whom you consulted in relation thereto, who, if any one, acted for said children before the court of probate in such settlement, and what payments or settlement you made with them in consequence thereof, and the same in relation to the trust estate.

(Complainants make same objection to this question as to the preceding question.)

A. A second and supplemental executors' account was presented to the court of probate, and accepted August 5, 1870. I gave notice beforehand by letters, which I caused to be sent to Isabella Colt DeWolf (formerly Isabella DeWolf Colt), daughter of Mrs. Christopher Colt, addressed to her on the 1st of August, 1870, at Newport, R. I., and by like letters to Mrs. Christopher Colt and Samuel P. Colt, addressed to each at Bristol, R. I., and to Henry C. Robinson, as attorney-at-law and in-fact for LeBaron B. Colt, by personal notice, the said LeBaron then being, according to my best recollection, absent in Europe, and Mr. Robinson holding his power of attorney to act in his absence.

I now produce and put in evidence a copy of the letters sent to the several parties, as above stated.

(Copy put in, and marked Exhibit 6.)

195 The letters thus sent contained each a printed copy of the order of notice entered by the court of probate beforehand for the settlement of the account.

I also put in evidence an original letter received by me from Samuel P. Colt and Mrs. Christopher Colt, guardian and purchaser of the estate of Edward D. Colt, and also a letter from Mrs. Isabella Colt DeWolf, in answer to the letters I caused to be sent to them, which are marked Exhibit 7^1 and Exhibit 7^2 respectively.

This executors' account was shown to Mr. Henry C. Robinson, as attorney for the Christopher Colt children, and examined and approved by him before it was accepted by the court of probate.

He acted before the court of probate as the attorney of said children. I do not remember that they, or either of them, were personally present before said court.

The balance appearing on hand for administration in this supplemental executors' account was paid over to the several parties entitled thereto, and amongst others, to the children of Christopher Colt. I put in evidence three receipts, bearing date Aug. 5, 1870, one signed by Mrs. Christopher Colt, as assignee of Edward D. Colt's interest, one by Mrs. Isabella Colt DeWolf, and one by Mrs. Christopher Colt, marked Exhibits 8^1, 8^2, 8^3, respectively. I also at the same date paid over to Mr. Henry C. Robinson LeBaron B. Colt's share of the fund in distribution, and took his receipt therefor, bearing the same date, which receipt is annexed to his deposition, and is marked Exhibit 3 in this case.

The final executors' account was presented in the court of probate, and finally settled there January 11, 1873.

The trustees' account with the children of Christopher Colt was settled the same day. The shares given to the executors in trust for them until the youngest should reach the age of majority was settled on the same day. I gave notice, by mail, to LeBaron B. Colt, at Chicago, to Mrs. Isabella Colt DeWolf, at the Hoffman House, N. Y., I suppose, and Samuel Pomeroy Colt, at Boston, as I suppose, that the executors' final account would be acted on before the court of probate on the eleventh of January, 1873, and that the executors would be ready to settle with
196 the children of Mrs. Christopher Colt in respect to the trust legacy in stock given to the executors for their benefit, Samuel Pomeroy Colt being then about to become of age.

I put in evidence three letters in reply to mine received from LeBaron B. Colt, one also received from F. E. DeWolf, husband of Mrs. Isabella Colt DeWolf, and one from Samuel Pomeroy Colt, which are marked respectively Exhibits 9^1, 9^2, 9^3, 9^4, 9^5.

If an explanation of these parts of the letters last put in evidence, which refer to the action of James B. Colt in connection with the final settlement of the estate and trust fund, I will say that Judge Colt was in a belligerent attitude toward the estate, both while his original suit was pending and from that time down to the final settlement of the estate, and even a long time afterward. When he learned that S. Pomeroy Colt was approaching his majority, and that on his reaching majority the final executors' account and the trust fund account were to be settled before the court of probate, he set himself about trying to delay these settlements in various ways, and amongst other things wrote me on the twenty-seventh of April, 1872, a letter which I now put in evidence, which is marked Exhibit 10^1; also a second letter, bearing date Dec. 24, 1872, with this last letter copy of my reply dated Dec. 12, 1872, endorsed thereon, which letter with copy of my reply, marked Exhibit 10^2; also a letter from the same party dated Dec. 29, 1872, and a copy of my reply, dated Dec. 23, 1872, which is marked Exhibit 10^3; also a

fourth letter from the same party, dated Jan. 7, 1873, together with a copy of my reply, dated Jan. 6, 1873, which is marked Exhibit 10[4]. The inconsistencies of the dates of the several letters and the replies thereto are due to mistakes made by Judge Colt in the order of the calendar. The copies of my replies to his letters are severally endorsed on the letters to which each is a reply. I advised Christopher Colt's children of the movements of Judge Colt intended to embarrass them, and such advice will account for the contents of the letters sent to me by them in reply.

197 I will also state in further explanation of some parts of the Christopher Colt's children's letters that I stated to them in my letters to them the general condition of the trust fund investment, as, for instance, that it was in the United States bonds or some other security, and inquired of them, whether, when they came to settle the trust account with the executors and to receive their several distributive shares of the same, they would prefer to find and receive it in the forms in which it was then invested, or that it should be converted by the executors into cash ready to be paid over to them as such on the settlement of the trust account.

I ought to have stated before, as being more orderly in respect to time, that when I informed Mrs. Isabella DeWolf Colt by letter of the time appointed for settlement of the final executor's account, and proposed for the settlement of the trust fund account, I advised her that if she was not to be present personally, she had best furnish her agent who was to be present with full powers to act in the matter of both settlements, and to give full discharges therefor. I received from her husband a letter bearing date December 24, 1872, informing me that a power of attorney had been that day sent by express, requesting me to examine it, advising me that he would be in Hartford on the 9th of January, proximo.

The power of attorney referred to in said letter as having been sent by express came duly to hand; and it, together with the letter which came before it, I now put in evidence, and which are marked, respectively, Exhibit 11[1] and Exhibit 11[2].

In respect to the final executors' account, I conferred with LeBaron B. Colt, S. Pomeroy Colt, and F. E. DeWolf, and with Mr. Robinson, who was acting on behalf of Mrs. Christopher Colt as assignee of her oldest son's, Edward D. Colt's, interest, and also as attorney for the other parties in interest.

Every one of the persons present (I mean LeBaron B. Colt, S. Pomeroy Colt, F. E. DeWolf, and Henry C. Robinson) expressed themselves satisfied with the executors' account, and as willing that it should be accepted and approved by the court of probate.

198 I remember to have had with me at my office a copy of an explanatory statement appended to the original final account of the executors, then lying, as I now remember, in the court of probate and not then accepted. This explanatory statement gave in skeleton the whole course of administration.

This statement I offered to show them and make any other explanations which they might desire.

They told me that they had seen both the account and the explanatory statement, and were entirely satisfied with it.

In respect to the settlement of the trust fund account, it took place in form on the 11th of January, 1873, not at the armory, which was the proper office of the executors, but at my own law office.

My recollection is that LeBaron B. Colt, S. Pomeroy Colt, and F. E. DeWolf, arrived in town on the evening of the 9th of January, and called on me at my residence on Washington avenue, and that I had with them there a general conference touching the matters involved in the coming settlements.

On the following day I was engaged in court for a part, perhaps the greater part, I do not now remember, of the day, but I saw them in course of the day, and had a conference with them in respect to the settlement of the trust fund account, which was to be adjusted on the following day, the 11th of January.

On the following day (the 11th,) at my law office, I met for the purpose of settling the trust fund account, LeBaron B. Colt, S. Pomeroy Colt and F. E. DeWolf, in joint conference. I explained to them as well as I knew how, and in good faith, the condition of the trust fund estate and of its administration from its beginning up to that date.

Either at my suggestion or at theirs, I cannot now remember which, Mr. Robinson was sent for and joined in the conference and the examination of the account.

By whomever he may have been called in, I expressed my pleasure that my account was to be settled in the presence of their
199 counsel, because I wanted to have everybody satisfied that the account was just and then I wanted a discharge from them in full.

I now put in evidence the trust-fund account before us at the time of examination and settlement, marked Exhibit 12.

By this account there was a balance of accumulations above annual or quarterly allowances made to the children of $132,536.45. After we had all agreed upon all the items contained in this account, the question was put by Mr. Robinson: "How much are you going to charge for services as trustees?" for there was at this time no charge for services as trustees. I said, "I have not even thought of the matter, nor am I sufficiently acquainted with the rates of compensation usually given for such services to be a proper judge, even in another's case, much less my own. My object today is to settle this account to the satisfaction of every beneficiary, and to have it ended henceforth and forever, and you yourselves may determine for yourselves what commission or compensation you will be satisfied to give, and I will abide by it, no matter what it may be." Mr. Robinson then commenced to state certain instances of allowances made on trust estates in this city. I said to him, "you

need not trouble yourself with that, go and consult with your clients, and report to me what you yourselves are perfectly willing to allow, and that shall end it." Mr. Robinson did as I requested of him, and reported to me, in their presence, that they were willing, unanimously willing, to allow $5,500 for compensation to the trustees, and were not only willing, but were perfectly content with it—more than willing. At that time, in his presence, and in the presence of his clients, I sat down, and in my own handwriting, (the account itself not being in my handwriting,) appended to the footing of the account, which was $132,535 45

The following contract:

"Less commissions to trustees, as agreed upon between trustees and beneficiaries 5,500 00

Balance for distribution ..... $127,036 05"

That entry having been made, I said to them: "Now, gentlemen, the administration of this trust has been a long one, and not without some embarrassments. Jim Colt (meaning Judge Colt) is giving out threatenings and slaughter, touching this very fund which we are now about to pay over to you. Now, if this is satisfactory to you, and if it is not, ask me now, and I will try to make it so; I want to you give us a full and complete discharge of everything under the will, both the administration account and the trust fund account, and so that we may be forever put to rest in respect to everybody except Judge Colt, whom we may have to fight with our own money after we have delivered over to you the whole trust estate."

They said they were willing to give such a discharge, and I added I would like to draw it up here in the presence of Mr. Robinson, their counsel, so that he might examine it and approve it; but I don't know as it can be well done here unless Mr. Robinson can go down to the armory with us, where we are to pay over the balance of the accumulations in the trust fund account and transfer the shares of stock constituting the principal of the trust estate.

Mr. Robinson said in their presence that he could not go down to the armory, neither was it necessary, and that I might draw up as complete and absolute a discharge as I desired, and that it would be satisfactory to himself and all the beneficiaries.

LeBaron B. Colt, S. Pomeroy Colt, and F. E. DeWolf went down to the armory together, where we met Mr. Jarvis, a co-executor. I drew up at the armory a formal discharge for the trustees, and also a form for the discharge of the executors in respect to everything that appertained to that estate.

(Plaintiffs object to the statements of the witness in regard to the contents of the paper referred to.)

I asked the two Colts and DeWolf to look at the forms as I had

drawn them; they did so, and said they were entirely satisfied wit
them.

LeBaron B. Colt made three copies of the trustees' discharge
which, together with the original drawn by me, were signed, on
by LeBaron B. Colt, one by Samuel P. Colt, and the third
201 by F. E. DeWolf, attorney for his wife, Isabella C. DeWolf,
and the original drawn by me by Henry C. Robinson, as attorney for Mrs. Christopher Colt, assignee of her son, Edward D. Colt. The discharge signed by Mr. Robinson was not signed at the tims, but was a few days afterwards. I now put in evidence the four discharges mentioned in the foregoing evidence, which are marked Exhibit 13^1, 13^2, 13^3, and 13^4, respectively.

The form of a general discharge was drawn by me either at the armory or at my office before going to the armory, and I am not certain which. However this may be, it was at the armory with us at our meeting, and was copied off by S. Pomeroy Colt, and, as copied, was read, all parties present, assented to by all parties present, and then and there signed by F. E. DeWolf, attorney for his wife, Isabella C. De Wolf, by Samuel P. Colt, by LeBaron B. Colt, and shortly afterwards, somewhere between that day and the sixteenth day of January, precisely on which day I cannot now say, by Henry C. Robinson, as attorney for Mrs. Christopher Colt, as assignee for the estate of her son, Edward D. Colt. I now put in evidence the discharge last mentioned, which is marked Exhibit 14.

The sums of money, the payment of which purports to be evidenced by the receipts which I have just put in evidence, as also the stocks receipted for on said discharges, were paid over and transferred to the parties respectively signing the same, on the execution of said discharges on the day the same bear date except in the case of the discharges which were signed by H. C. Robinson, which were paid shortly afterwards.

(Counsel for plaintiffs object to the introduction in evidence of each and every of the letters referred to in the foregoing answer, which are from other persons than those who are parties to this case.)

(Counsel for defendants offer in evidence paper marked Exhibit 15, containing extracts from the records of the probate court relating to the settlement of said estate, it being agreed that if counsel for
petitioners desire to have more full extracts put in evidence
202 by the defendants hereafter it shall be done upon receiving
notice from plaintiffs' counsel.)

Witness continues answer to Int. 6.

Many times before the settlement of the trust fund account, on the 11th of January, 1873, I had explained many times to LeBaron B. Colt and S. Pomeroy Colt the condition of that fund, and, in one instance that I now well remember, to Mrs. Isabella C. DeWolf and to her husband.

7. Will you state whether or not you complied with the orders

of the court of probate in relation to giving notice of the settlement of the three executors' accounts, as shown in Exhibit 15?

(Complainants' counsel object to the question as incompetent and as calling for matter the testimony of the witness upon which would not be the best evidence.)

A. I have not examined the exhibit referred to, but I know that in case of the order of notice by the probate court upon each of three executors' accounts I complied with the requirements of the order by posting and by publication in newspapers, according to the precept of the order. The notices which I gave personally and by letter to the plaintiffs in this suit in respect to the settlement of these accounts was not required by the court, but was volunteered by me, in order that I might only not offend against my duty to the plaintiffs, but might fulfill it.

8. Will you state what assets of the estate of Samuel Colt, if any, remained in the hands of the executors at the time this present suit was brought?

A. Nothing but a reversion in $574\frac{26}{31}$ shares of the Colt Patent Fire-arms Manufacturing Company, dependent on the life of Judge Colt, if he was living at the time this suit was brought (whether he was or not I do not now remember); if he was dead, then $574\frac{26}{31}$ shares of said stock, and nothing else.

Cross-examination waived.

R. D. HUBBARD.

Sworn to and subscribed, this 7th day of September, A. D. 1880, before me.

E. E. MARVIN, *Examiner.*

203 It is stipulated that John Hooker, of Hartford, was the official reporter of the supreme court of errors for State of Connecticut during the year 1866; that he made minutes of the argument and proceedings in the case of J. B Colt *vs.* E. H. Colt and others, executors, at the February term of said court in 1866, and that the paper hereto annexed, marked Exhibit 16, is a correct copy of his minutes of the argument of said case argued at said term, and is to be taken in evidence as if testified to by him.

It is further stipulated that the will and codicils of Samuel Colt, referred to in petitioners' bill, marked therein Exhibits A, B, and C, may be considered in evidence in the case as if duly proved and as being true copies of the said will and codicils, and that Exhibits D and E referred to in said bill are to be considered in evidence in said case as true copies of the brief and legal proceedings therein referred to as if regularly proved in the case; and it is agreed that brief was filed in said case as is alleged in said bill, and that the legal proceedings stated in said exhibit were had as is therein stated, and if there should be any verbal or other inaccuracies or

omissions in any of said papers that they may be corrected at any time before trial.

Defendant rests.

204 [*Defendants' Exhibit No.* 1. *E. E. Marvin, Ex'm'r.*]

No. 879. HARTFORD, CONN., *Jan.* 16, 1866.

GEORGE P. BISSELL & Co.,

Pay to the order of Mrs. T. D. W. Colt, guardian, thirty-two thousand three hundred sixty-four and eighty-four one-hundredths dollars.

$32,364.84. HENRY C. ROBINSON.

Endorsed: Theodora D. W. Colt, guardian, by Geo. D. Colt, attorney.

[*Defendants' Exhibit No.* 2. *E. E. Marvin, Ex'm'r.*]

No. 901. HARTFORD, CONN., *April* 23, 1867.

GEORGE P. BISSELL & Co.,

Pay to the order of Mrs. T. D. W. Colt, guardian, two hundred and fifty dollars.

$250. HENRY C. ROBINSON.

Endorsed: Theodora D. W. Colt, guardian, by Geo. D. Colt, attorney.

[*Defendants' Exhibit No.* 3. *E. E. Marvin, Ex'm'r.*]

Received, Hartford, Aug. 5, 1870, of the executors of the will of Samuel Colt, three thousand six hundred eleven and eleven one-hundredths dollars, being my share of the fund divided in supplementary distribution to the legatees under said will, by order of the court of probate, bearing date Aug. 5, 1870. This receipt is signed by me in duplicate.

LEBARON B. COLT,
By HENRY C. ROBINSON,
His Attorney.

[*Defendants' Exhibit* 4. *E. E. Marvin, Ex'm'r.*]

To all to whom these presents shall come, know ye:

That I have constituted and appointed, and by these presents do hereby constitute and appoint Henry C. Robinson, of Hart-
205 ford, my true and lawful attorney, for me and in my name to make and execute any and all releases, discharges, receipts, and instruments of any and every nature, to settle any and all claim I have in law or equity against the estate of Samuel Colt, late of Hartford, deceased, and especially to settle, adjust, and release any and all claims of mine, as successor by purchase to all the rights of the estate of the late Edward D. Colt, of the city of Hartford, while in life, in and to any and all legacies, gifts, and distributive shares and benefits due to said E. D. Colt's estate from the estate of said

Samuel Colt; and for me and in my name to do any and every act necessary and proper to settle the claims of the estate of E. D. Colt aforesaid upon said estate of Samuel Colt, so far as I have any right and authority to settle said claims, and to make and execute all and every proper instrument of assent and consent to the payment by the executors of said Samuel Colt's will to my daughter, Mrs. Isabella C. DeWolf, (or to her lawful attorney,) and to my son, LeBaron B. Colt, their respective claims and the amount thereof upon the interest of said Edward D.'s estate in the estate of said Samuel Colt, my said daughter and son LeBaron each having earlier claims upon the interest of said Edward D.'s estate in said Samuel Colt's estate than my own claim.

Hereby authorizing said Robinson to do any and every act proper to carry out the foregoing as fully and completely as I could do were I personally present.

In witness whereof I, Theodora DeWolf Colt, now of Bristol, Rhode Island, have hereunto affixed my signature and seal at Bristol, this 14th day of January, A. D. 1873.

THEODORA DEW. COLT. [SEAL.]

In presence of—

[SEAL.] SAMUEL TAYLOR.
H. DEW. WOODRUFF.

Subscribed and acknowledged before me this 14th day of January, 1873.

NATH. S. GREENE,
Public Notary.

206 [*Exhibit* 5¹. *E. E. M., Ex'm'r.*]

Received, Hartford, July 14, 1866, of the executors of the estate of the late Col. Samuel Colt, the sum of eleven thousand nine hundred six and thirty-five one-hundredths dollars in cash; also, $3,000 in bonds of State of Connecticut; also, 1 bond of United States (6 per cent. of 1881) of $1,000; also, 20 shares of stock of Hartford and New York Steamboat Co.; also, 50 shares of stock of Union Ferry Co., the whole in full of my distributive share of personal estate of said Colt, as per distribution on file.

ISABELLA D. W. COLT,
By EDWARD D. COLT, *Attorney.*

[*Exhibit* 5². *E. E. M., Ex'm'r.*]

Received, Hartford, July 14, 1866, of the executors of the estate of the late Samuel Colt eleven thousand eight hundred forty-three and eighty-five one-hundredths dollars in cash; also, $3,000 in bonds of the State of Connecticut; also, 1 United States bond for $1,000 (6 per cent. of 1881); also, 15 shares of stock of Hartford and New York Steamboat Co.; also, 50 shares of stock of Union Ferry Co., all in full of my distributive share of personal estate of said Colt, as per distribution filed.

EDWARD D. COLT.

[*Exhibit* 5³. *E. E. M., Ex'm'r.*]

Received, Hartford, July 14, 1866, of the executors of the estate of the late Col. Samuel Colt the sum of eleven thousand nine hundred thirty-one and thirty-five one-hundredths dollars ($11,931.35) in cash; also, $3,000 in bonds of State of Connecticut; also, 1 United States bond (6 per cent. of 1881) of $1,000; also, 25 shares of stock of Hartford and New York Steamboat Co., the whole in full of the distributive share of my son, LeBaron Colt, in personal estate of said Colt, as per distribution on file.

THEODORA D. W. COLT, *Guardian.*

207 [*Exhibit* 5⁴. *E. E. M., Ex'm'r.*]

Received, Hartford, July 14, 1866, of the executors of the estate of the late Col. Samuel Colt, the sum of eleven thousand nine hundred thirty-one and thirty-five one hundredths dollars in cash; also, $3,000 in bonds of State of Connecticut; also, 1 United States bond (6 per cent. of 1881) for $1,000; also, 25 shares of stock of Hartford and New York Steamboat Co., all in full of the distributive share of my son, S. Pomeroy Colt, in the personal estate of said Colt, as per distribution on file.

THEODORA D. W. COLT, *Guardian.*

[*Exhibit* 6. *E. E. M., Ex'm'r.*]

Supplemental Account.

HARTFORD, *Aug.* 1, 1875.

We beg to submit the following statement in explanation of our supplemental administration account on the estate of Col. Samuel Colt:

There was reserved from our prior account for State, city, and United States taxes unpaid, for annuities to L. B. and S. P. Colt, for dividends on residuary stock of S. C. Colt, E. D. Colt, L. B. Colt, and S. P. Colt, subject to decision of supreme court, for Texas matter, appeal of J. B. Colt from probate, and other contingencies, $160,000.

There have been paid since prior settlement the following principal sums:

For State, city, and United States taxes, unpaid at prior settlement	$30,145 97
To E. D. C., for dividends on residuary stock	13,777 00
To L. B. and S. P. Colt, on same account	34,864 84
To Samuel C. Colt, on same account	30,420 46
To paid stock legatees, under will reserved for taxes	6,413 40

In addition to these sums, we have made payments for annuities and for subsequently accruing dividends on residuary stock to L. P. and S. P. Colt, and sundry other payments. Our account consists

entirely of moneys received and paid out; nothing else appears in it.

208 We have on hand a balance of $75,390.54.

Of this we propose to divide $63,000, reserving $12,390.54 for payment of annuities, pending litigation, &c.

We propose to settle our account before the court of probate on Friday next at 2 o'clock, and should be happy to exhibit the same to you then, or at any time before.

If you are not to be here to receive your portion, have the kindness to inform us in what manner we shall make payment.

Very respectfully yours,

R. D. HUBBARD, *Executor.*

HARTFORD, *Aug.* 1, 1870.

Copy of above, with printed order of notice, sent by mail to—
Isabella Colt DeWolf, Newport, R. I.
Theodora D. W. Colt, Bristol, R. I.
Samuel P. Colt, " "

W. D. HUBBARD.

[*Exhibit* 7[1]. *E. E. M., Ex'm'r.*]

NEWPORT, R. I., *Aug.* 4, 1870.

MY DEAR SIR: Your favor of August 1st received this morning, and we would say in reply that, as it is not necessary, neither of us will be in Hartford at the settlement; and therefore will thank you to send the amounts coming to us to Bristol, R. I., and in a New York check or draft, if convenient.

Very truly yours,

SAMUEL P. COLT,
THEODORA D. W. COLT,
Guardian and Purchaser of Estate of Edward D. Colt.

[*Exhibit* 7[2]. *E. E. M., Ex'm'r.*]

NEWPORT, *Aug.* 3*d*, 1870.

R. D. HUBBARD, Esq.:

DEAR SIR: Your letter is received, and contents noted. It is impossible for me to be in Hartford on Friday, at the settle-
209 ment, therefore will you have the kindness to send me a draft for my portion, and oblige,

Yours very truly,

P. O. Box 662 I. C. DEWOLF.

[*Exhibit* 8[1]. *E. E. M., Ex'm'r.*]

Received, Hartford, Aug. 5, 1870, of the executors of the will of Samuel Colt three thousand six hundred eleven and eleven one-hundredths dollars ($3,611.11), being the share due the estate of Ed. D. Colt of the fund divided in supplementary distribution to the legatees under said will by order of the court of probate bearing

date as above, said share having been duly assigned to me by an instrument signed by the administrator of said estate, and a copy left with said executors. This receipt is signed in duplicate.

THEODORA G. D. W. COLT.

[*Exhibit* 8^2. *E. E. M., Ex'm'r.*]

Received, Hartford, Aug. 5, 1870, of the executors of the will of Samuel Colt, three thousand six hundred eleven and eleven one-hundredths dollars ($3,611.11) being my share of the fund divided in supplementary distribution to the legatees under said will, by order of the court of probate bearing date Aug. 5, 1870. This receipt is signed by me in duplicate.

ISABELLA COLT DEWOLF.

[*Exhibit* 8^3. *E. E. M., Ex'm'r.*]

Received, Hartford, Aug. 5, 1870, of the executors of the will of Samuel Colt, three thousand six hundred eleven and eleven one-hundredths dollars, being the share of my son, Samuel P. Colt, in the fund divided in supplementary distribution to the legatees under said will, by order of the court of probate, bearing date Aug. 5, 1870. This receipt is signed by me in duplicate.

$3,611.11 THEODORA D. W. COLT,
Guardian for S. P. Colt.

210 [*Exhibit* 9^1. *E. E. M., Ex'm'r.*]

Trust Account Settlement.

31 25TH STREET, CHICAGO, *Dec.* 27, 1872.

HON. R. D. HUBBARD.

MY DEAR SIR: Your last, with its startling contents, is just received. It can hardly be possible that J. B. Colt has any ground upon which to prosecute a suit of this character, though insanity and ugliness may prompt him to try anything. I trust you will not let this cause a postponement in the payment of the fund, unless absolutely necessary. In some business engagements I have calculated upon receiving the fund the 10th of January, and any delay will cause me most serious trouble. My brother Pom. and my brother Ed.'s estate are largely my debtors, and I have reckoned upon a grand settlement at this date. Will you please write me on this subject of a possibility of delay?

I thank you for the kind sentiment at the close of your last. In the midst of gathering clouds it might seem as if I had an object in it if I responded as I feel.

Very truly yours, LEBARON B. COLT.

[*Exhibit* 9^2. *E. E. M., Ex'm'r.*]

31 25TH STREET, CHICAGO, *Dec.* 27, 1872.

HON. R. D. HUBBARD.

MY DEAR SIR: Your last favor giving a general statement of

trust fund account, is received. I am much obliged for it. Concerning accumulations, I myself would prefer to have the bonds sold and proceeds divided. While I cannot speak for my brother or sister on this point, yet I know we all have settlements to make among ourselves, and myself with outside parties also, which would be facilitated by this means.

Very truly yours, L. B. COLT.

211 [*Exhibit* 9^{3}. *E. E. M., Ex'm'r.*]

31 25TH STREET, CHICAGO, *Dec.* 20, 1872.

Hon. R. D. HUBBARD.

DEAR SIR: Your last favor is received. I never had the least doubt but what the trust fund was being administered honestly in every particular, nor have I forgotten, whatever not unnatural sore feeling was exhibited towards the close of the law suit a few years ago, that your original interpretation of the will would have more than doubled the amount we are now to receive from this fund, in accordance with the decree of the supreme court of errors.

Very truly yours, L. B. COLT.

[*Exhibit* 9^{4}. *E. E. M., Ex'm'r*]

HOFFMAN HOUSE, *Dec.* 29, 1872.

Hon. R. D. HUBBARD, *Hartford, Conn.*

MY DEAR SIR: Your favor of 26th inst. is received, and contents carefully noticed. J. B. Colt has long talked of this suit, and I have thought, as you do, that his purpose is to try and levy blackmail. Allow me to thank you for the interest you have taken in this matter, and hope you will use your influence to prevent Colt making delay in the settlement, as I must return to my business in California as soon as possible. However, if he is determined to have a suit, I think we have no reason to fear the result.

I have always known that you did all in your power to prevent Colt getting what he did, and I have reason to believe if Mrs. C. Colt had only listened to your advice her family might have received all that Col. Colt *intended* they should.

I shall be in Hartford the 9th of next month. Please do as you think best as to selling the United States bonds.

I remain, dear, sir, yours sincerely,

F. E. DEWOLF.

If Colt should attempt any injunction, or bring suit, please notify me, and oblige,

Yours, F. E. D.

212 [*Exhibit* 9⁵. *E. E. M., Ex'm'r.*]

17 BEACON STREET, BOSTON, *Jan'y* 2, '73.

MR. HUBBARD.

DEAR SIR: Your favor of the 30th ult. has just reached me.

The *tenth*, and not the *twelfth*, of this month is my birthday. I shall be in Hartford on the 10th, if agreeable to you to make the distribution of the trust fund then. I should prefer to have the bonds converted into cash.

As you say, I will have a handsome little sum of pocket money, and I hope that I may be found competent to take care of it.

Thanking you for your many kindnesses, I am,

Very respectfully yours, SAMUEL P. COLT.

[*Exhibit* 10¹. *E. E. M., Ex'm'r.*]

HARTFORD, CONN., 27 *April*, 1872.

DEAR SIR: On Wednesday next (1st May), at 11 a. m., application will be made before the probate judge for and on behalf of Alice Colt and James B. Colt, Jr., for an appeal to set aside the second codicil revoking their interest under the will of their uncle, the late Col. Samuel Colt.

Very respectfully, J. B. COLT.

Hon. R. D. HUBBARD, *Executor.*

[*Exhibit* 10².—*E. E. M., Ex'm'r.*]

HARTFORD, *Dec.* 24, 1872.

DEAR SIR: Your note of the 23d inst. is just received. I have no doubt that the revocation of my children's interest under the will of my late unfortunate brother, Samuel Colt, by undue influence and fraud or mistake; and suit will be brought to recover their interest as soon as my health will permit and the necessary papers can be prepared and attorneys secured.

The object of this note is to notify you of the fact, as ex-
213 ecutor in part, and to protest against either your or either of the executors paying over their principal of the fund or property to any one in adverse interest to my children.

Respectfully, J. B. COLT.

R. D. HUBBARD,
Executor in part of the Estate of Samuel Colt.

DEC. 12, 1872.

J. B. COLT, ESQ.

DEAR SIR: Your nephew, Pomeroy Colt, becomes of age, I am informed, on the twelfth day of January, 1873. We shall on that day, unless otherwise ordered by legal process, pay over the trust fund of 500 shares of Colt's company stock, and the accumulations thereof, to the children of Christopher Colt, to whom it is given in the will. The interest of this fund has been in part devoted to the

education of these children. We have been holding it many years to their use, and the trust will expire by its own limitation on the day above named. If you had intended to contest the right of these parties you should have done it long since.

Yours, respectfully, R. D. H.

[*Exhibit* 10^3. *E. E. M., Exm'r.*]

HARTFORD, CONN., *Dec.* 29, 1872.

DEAR SIR: I have the *bill* written, and can at once give you a copy if you will *acknowledge service.*

Please advise me at once.

Respectfully, J. B. COLT.

P. S.—I have opened the note to say that I have not a particle doubt of there being in law ample proof that the revocations in the Colt will were brought about by undue influence and fraud; that the evidence has come to me since the decree made some time since, and as soon as I am able, my health permitting, I shall test the questions in the courts of law and equity.

J. B. C.

214 DEC. 23, 1872.

DEAR SIR: I shall feel it to be my duty to decline to acknowledge service as you propose.

I am satisfied the fund of 500 shares and accumulations belongs to your nephews and niece on the Chistopher Colt side, and I shall do nothing and consent to nothing which shall at this late day delay them in the enjoyment of their rights.

The course you propose to yourself will, in my judgment, be fruitless to you, and can only work vexation and delay to them.

Yours respectfully, R. D. HUBBARD.

[*Exhibit* 10^4. *E. E. M., Ex'm'r.*]

HARTFORD, CONN., *Jan.* 7, 1873.

DEAR SIR: It is time I had an answer to my last note to you and the other executors. None received as yet. I have no business here, you know, but this Colt will business consuming so much valuable time; now over ten years; but I shall die in my tracks here if it is necessary.

You must know my youngest child will not be twenty-one for some time yet.

My health is as good as could reasonably be expected of a man of my years, and the typhoid of the spring has not shattered at all my constitution, as it does in some cases; rather, will prolong life with ordinary prudence.

I desire an early answer to my last note, which is the object of this.

Respectfully yours, J. B. COLT.

P. S.—Mr. Hubbard speaks in one of his letters of my looking to Christopher's children, who are soon to be in funds. I shall look to no such source. As to the question of the time of raising the issue of my children's rights, and the advances for the schooling of Christopher's children (for the schooling, &c., under the will), I never proceeded in any way but under the will in my
215 own case, rejecting the codicils; and as to outlay for education, &c., I don't suppose it has been excessive, nor more than would have been incurred by me, probably, had the codicils never existed.

You, Mr. Hubbard, must certainly regard me as a truthful, an honest man, or our correspondence had better cease. The Jarvises I never knew; and while that may argue a want of knowledge in human nature, I am quite sure the introduction of one of its members into my father's family has not contributed to its harmony or prosperity of any one of its members.

JANUARY 6, 1873.

DEAR SIR: I have already informed you that the executors will feel obliged to make a final settlement of the estate and trust on the 10th inst., unless otherwise ordered in due course of law. We have seen no reason to change our conclusions.

Yours respectfully, R. D. HUBBARD.

[*Exhibit* 11¹. *E. E. M., Ex'm'r.*]

Know all men by these presents, that I, Isabella Colt DeWolf, wife of Frank E. Dewolf, formerly of Bristol, Rhode Island, but now of the city of Oakland, in the State of California, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, my said husband my true and lawful attorney for me, and in my name, place, and stead to represent me in the settlement and distribution of the estate of my uncle, Samuel Colt, of Hartford, Connecticut, now deceased, to ask, demand, sue for, recover, and receive all property, real and personal, coming or belonging to me as one of the heirs of my said uncle, or under his last will, and upon the receipt thereof to give proper acquittances and discharges therefor; and also to ask, demand, sue for, recover, and receive all sums of money which are or may be due and owing to me by the estate of my brother, Edward Colt, of said
216 Hartford, now deceased, and upon the receipt thereof to give proper discharges therefor.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal, the ninth day of December, A. D. 1872.

ISABELLA COLT DEWOLF.. [SEAL.]

Signed, sealed, and delivered in the presence of—

F. I THIBAULT.
J. MASON.

United States of America.

STATE OF CALIFORNIA, } ss :
City and County of San Francisco, }

I, F. I. Thibault, a commissioner for the State of Connecticut, duly commissioned by the executive authority, and qualified under and by virtue of the laws thereof, residing in the city and county of San Francisco, State of California, do certify that on this ninth day of December, A. D. one thousand eight hundred and seventy-two, before me personally appeared Isabella Colt DeWolf, wife of Frank E. DeWolf, whose name is subscribed to the foregoing instrument, who is personally known to me to be the individual described in, and who executed the foregoing instrument, and she, the said Isabella Colt DeWolf, duly acknowledged the same to be her free act and deed, before me.

In witness whereof, I have hereunto set my hand and affixed my official seal as such commissioner at my office, in the city and county of San Francisco, State of California, this ninth day of December, A. D. 1872.

[SEAL.] F. I. THIBAULT,
Commissioner for Connecticut, in California.

217 [*Exhibit* 11². *E. E. M., Ex'm'r.*]

NEW YORK, *Dec.* 24, 1872.

Hon. R. D. HUBBARD, *Hartford, Conn.*

MY DEAR SIR: I send you this day by express Mrs. DeWolf's power of attorney, and beg you to examine and acknowledge receipt thereof.

I shall be in Hartford the 9th of January—meanwhile I remain,

Yours sincerely, F. E. DEWOLF,
Hoffman House, New York.

[*Exhibit* 12. *E. E. M., Ex'm'r.*]

Executors of Estate of Samuel Colt in Account with Heirs of Christopher Colt.

DR.

1863.		
June 2.	Check of Colt's Pat. Fire-arms M'f'g Co., for dividends accrued on 500 shares stock	$25,000 00
Sept. 11.	Coupons on $19,000 Conn. State Bonds	570 00
June 11.	Dividend declared on 500 shares stock of Colt's Pat. Fire-arms M'f'g Co.	5,000 00
Oct.	Dividend declared on 500 shares stock of Colt's Pat. Fire-arms M'f'g Co.	5,000 00
1864.		
Jan. 1.	Coupons $19,000 Conn. Bonds	570 00
April 9.	Dividends on 500 shares	5,000 00
April 28.	Coupons on $12,000 Conn. State Bonds, transferred	360 00
July 1.	Coupons on $31,000 Conn. State Bonds	930 00
Oct. 20.	Dividend on 500 shares stock Colt's Arms Co.	10,000 00
	Coupons on $10,000 Conn. State Bonds, transferred January and July	600 00
1865.		
Jan. 1.	Coupons on $41,000 Conn. State Bonds	1,230 00
June 1.	Dividend on 500 shares stock Colt's Arms Co.	10,000 00
July 1.	Coupons on $41,000 Conn. State Bonds	1,230 00
Oct.	Dividend on 500 shares stock Colt's Arms Co.	5,000 00
1866.		
Jan. 2.	Dividend on 500 shares stock Colt's Arms Co.	5,000 00
	Coupons on $41,000 Conn. State Bonds	1,230 00
April 2.	Dividend on 500 shares stock Colt's Arms Co.	5,000 00
July 1.	Coupons on Conn. State Bonds, April and July	1,740 00
Nov. 2.	Coupons on $17,000 Conn. State Bonds	510 00
9.	Dividend Colt's Arms Co.	2,500 00
218		
1867.		
Jan. 17.	Coupons on $46,000 Conn. State Bonds	1,380 00
April 5.	Dividend Colt's Arms Co.	5,000 00
April 5.	Coupons on $17,000 Conn. 6's	510 00
June 12.	Amount refunded by executors excess of sum reserved for taxes, 1866	1,000 00

1867.			
July 24.	Coupons on $55,000 Conn. State Bonds		$1,650 00
Oct. 14.	Dividends Colt's Pat. Fire-arms. Co.		5,000 00
Oct. 14.	Coupons Conn. State Bonds $17,000, non-taxable issue		510 00
1868.			
Jan. 1.	Coupons on $55,000 Conn. State Bonds		1,650 00
April 7.	Dividends Colt's Pat. Fire Arms M'f'g. Co.		2,500 00
April 7.	Coupons on Conn. State Bonds $17,000, non-taxable issue		510 00
July 1.	Coupons on $62,000 Conn. State Bonds		1,860 00
Oct. 19.	Dividend on 500 shares stock Colt's Arms Co.		5,000 00
	Coupons on $17,000 Conn. 6's		510 00
1869.			
Jan. 6.	Coupons on $6,600 Conn. 6's		1,980 00
Mar. 25.	Proceeds of $66,000 bonds of Conn., with interest, redeemed by State		66,913 00
April 6.	Dividend Colt's Arms Co., on 500 shares stock.		5,000 00
	Coupons Conn. State Bonds, $17,000		510 00
May 4.	Interest allowed by bank on balance to Jan. 1, '69		171 86
Oct. 1.	Coupons Conn. State Bonds, $17,000		510 00
	Interest on U. S. Stock collected in July		2,028 55
	Interest on balance in Conn. River Bank to July 1		419 93
Oct. 12.	Dividend Colt's Arms Co.		2,500 00
1870.			
Jan. 1.	Interest on Reg. 6's, 1881	$2,130 00	
	Prem. on above, less tax	438 83	2,568 83
April 1.	Coupons on Conn. Bonds		510 00
	Dividend Colt's Arms Co.		2,500 00
July 6.	Coupons on $7,600 U. S. 6's, 1881,	$2,280 00	
		270 41	2,550 41
Oct. 1.	Coupons Conn. Bonds		510 00
Nov. 1.	Dividend Colt's Arms Co.		2,500 00
1871.			
Jan. 1.	Interest on U. S. 6's, 1881	$2,370 00	
	Prem. on coin	251 77	2,621 77
April 1.	Coupons Conn. State 6's		510 00
April 3.	Dividend Colt's Arms Co.		2,500 00
July 1.	Int. on U. S. 6's, 1881		2,520 00
	Prem. on coin		312 00
Oct. 30.	Div. on 500 shares stock Colt's Arms Co.		1,500 00
	Coupons Conn. State 6's		510 00

1872.			
Jan. 1.	Int. on $87,000 U. S. Reg. 6's, 1881,	$2,610.00	
	Prem. on coin	234.90	$2,844 90
April 1.	Coupons Conn. State 6's		510 00
April 16.	Dividend Colt's Arms Co.		1,500 00
219			
July 1.	Int. on $93,000 U. S. Reg. 6's, 1881,	$2,790 00	
	Prem. on coin,	383 62	3,173 62
Oct. 1.	Coupons on $17,000 Conn. State 6's		510 00
1873.			
Jan.	Proceeds of sale of $93,000 U. S. Reg. 6's 1881:		
	Interest on $93,000 U. S. Reg. 6's, 1881—		
	Coin $2,790 00		
	Prem 327 83	$3,117 83	
	Interest to date on balances at bank	200 00	3,317 83
			$227,052 70
Jan. 5.	Balance cash on hand at date	$8,357 25	
	Proceeds of sale of $93,000 U. S. Reg. 6's, '31, at 114¾,	$106,717 50	
	Less commission	116 25	106,601 25
	Proceeds of sale of $17,000 Conn. State Bonds at 103½	$17,595 00	
	Less commission	21 25	17,573 75
	Interest on $75.95		3 80 $132,536 05
	Less commissions to trustees as agreed upon between trustees and beneficiaries		5,500 00
	Balance for distribution		$127,036 05

CR.

1863.			
Jan. 24.	By cash to Mrs. Theodora Colt, guardian, for 1862, allowances to—		
	Ed. D. Colt	$500 00	
	LeB. Colt	500 00	
	S. Pomeroy Colt	300 00	$1,300 00

1863.				
April 8.	By cash to Mrs. Theodora Colt, guardian quarterly allowances for education to			
	Ed. D. Colt		$125 00	
	LeB. Colt		125 00	
	S. Pomeroy Colt		75 00	$325 00
June 3.	By cash paid for $15,000 Conn. State Bonds at 117		$17,550 00	
	And interest from Jan. 1st		384 67	17,934 67
June 5.	By cash paid for $4,000 Conn. Bonds at 117		$4,680 00	
	Interest 5 months 3 days		104 00	4,784 00
July 1.	By cash to Mrs. Theo. Colt, guardian, allowances for education to—			
	Ed. D. Colt, and LeB. Colt		$250 00	
	S. Pomeroy Colt		75 00	325 00
220				
Oct. 6.	By cash to Mrs. Theodora Colt, guardian, allowances to—			
	Ed. D. Colt		$125 00	
	LeB. Colt		125 00	
	S. Pomeroy Colt		75 00	325 00
1864.				
April 1.	By cash to Mrs. Theodora Colt, guardian, allowances for education to—			
	Ed. D. Colt		$125 00	
	LeB. Colt		125 00	
	S. Pomeroy Colt		75 00	325 00
April 28.	By cash paid for $12,000 Conn. estate bonds, at $1.10		$13,200 00	
	Interest accrued 5 mos. 3 days		306 00	13,506 00
July 1.	By cash to Mrs. Theodora Colt, guardian, allowances for education to—			
	Ed. D. Colt		$125 00	
	LeB. Colt		125 00	
	S. Pomeroy Colt		75 00	325 00
Oct. 1.	By cash to Mrs. Theo. Colt, guardian, allowances for education to—			
	Ed. D. Colt		$125 00	
	LeB. Colt		125 00	
	S. Pomeroy Colt		75 00	325 00
Oct. 20.	By cash paid for Conn. State bonds, $10,000, at $1.10		$11,000 00	
	Interest, 5 months 3 days		255 00	11,255 00

1864.			
Jan. 4.	By cash to Mrs. Theo. Colt, guardian, allowances to—		
	Ed. D. Colt	$125 00	
	LeB. Colt	125 00	
	S. P. Colt	75 00	$325 00
1865.			
Jan. 4.	Check to Mrs. Theo. Colt, guardian, quarterly allowances to—		
	Ed. D. Colt	$125 00	
	LeB. Colt	125 00	
	S. P. Colt	75 00	375 00
April 1.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	Ed. D. Colt	$125 00	
	LeB. Colt	125 60	
	S. P. Colt	75 00	375 00
May 29.	Mrs. Theo. Colt, guardian, cash for proportion of quarterly allowance to May 28th, of Ed. D. Colt		80 00
July 2.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	LeB. Colt	$175 00	
	S. P. Colt	75 00	250
221			
Oct. 2.	Mrs. Theo. Colt, guardian, quarterly allowance to—		
	LeB. Colt	$175 00	
	S. P. Colt	75 00	250 00
Dec. 15.	Cash paid by estate for U. S. income tax,		
	1862, list of	$1,250 00	
	1863, list of	437 50	
	1863, list of, special	437 50	
	1864, list of	1,412 50	3,537 50
1866.			
Jan. 1.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	LeB. Colt	$175 00	
	S. P. Colt	125 00	300 00
Jan. 15.	Cash paid Phœnix Bank for $17,000 Conn. State Bonds at par, and interest accrued from October 1 to December 1		17,170 46
April 2.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	LeB. Colt	$175 00	
	S. P. Colt	125 00	300 00
June	Additional amount for taxes for 1862, '3, '4, paid by estate		212 50

1866.			
June	Cash reserved for taxes of 1865, '6, paid by estate		$2,500 00
July 5.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	LeB. Colt	$175 00	
	S. P. Colt	125 00	300 00
July 23.	Check to R. D. Hubbard, Esq., for purchase of $5,000 Conn. State Bonds		5,000 00
	Express charges on same		1 00
Oct 1.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	Ed. D. Colt	$175 00	
	S. P. Colt	125 00	300 00
1867.			
Jan. 15.	Mrs. Theo. Colt, guardian, quarterly allowances to—		
	LeB. Colt	$175 00	
	S. P. Colt	125 00	300 00
	Mrs. Theo. Colt, guardian, allowances for 1867, to date of majority of—		
	LeB. Colt	$408 33	
	S. P. Colt	500 00	908 33
Mar.	Cash paid to H. T. Morgan & Co.	4,000 00	
	Conn. State Bonds, at par	4,000 00	
	Brokerage	10 00	4,010 00
222			
May 6.	Cash paid H. T. Morgan & Co., of $2,000 Conn. State Bonds, at 100½	2,010 00	
	Brokerage	5 00	2,015 00
May 16.	Cash paid H. T. Morgan & Co., $3,000 Conn. 6's, at 101	3,030 00	
	Brokerage	7 50	3,037 00
	H. A. Grant, collector U. S. income tax for 1816		717 75
	H. H. Fitch, collector city tax for 1866		473 37
	H. T. Sperry, collector town tax for 1866		568 04
1868.			
Feb'y 20.	Cash paid $7,000 Conn. State Bonds, at par		7,000 00
Mar. 13.	Cash paid R. W. H. Jarvis, for disbursements per check book	$3 00	
	Express charges on bonds from N. Y.	80	3 80
May 20.	Cash paid H. A. Grant, collector U. S. tax, on income for 1867		614 55

1868.		
June 25.	John Franey, collector town and city tax for 1867	$1,078 96
July 1.	Cash for $4,000 Conn. State Bonds	4,000 00
1869.		
Mar. 25.	Commission for conversion bonds	82 50
April 15.	Cash paid for $50,000.00 U. S. Reg. 6's, 1881, at 116⅜	58,187 50
	Brokerage and charges on same	63 86
May 21.	Cash paid H. C. Deming, collector income tax, 1868	516 80
June	Cash paid for $10,000 U. S. Reg. 6's, 1881, at 117⅜, and charges	11,750 60
July 9.	Cash paid John Franey, collector town and city tax list of 1868	1,180 27
Sept. 7.	Cash paid Conn. River Bank for $7,000 U. S. Reg. 6's at 122¾	8,592 50
	Commission and charges	18 10
Nov. 22.	Cash paid for $4,000 U. S. Reg. 6's, 1881, at 117⅞	4,715 00
	Commission on same	5 00
1870.		
May 18.	Cash paid for $5,000 U. S. Reg. 6's, 1881, at 117⅛	5,856 25
	Brokerage and tax	6 25
May 28.	Paid H. C. Deming, collector U. S. income tax, 1869	587 20
June 30.	John Franey, collector town and city tax, 1869	59 81
	Express charges paid by Conn. River Bank, bonds sent to Washington for registry	3 25
Nov. 26.	Conn. River Banking Co., $3,000 U. S. Reg. 6's, 1881, at 113½	3,405 00
	Commission	3 75

223

1871.		
May 16.	J. A. Butler, Prest., $5,000 U. S. Reg. 6's, 1881, at 117¼, and commission	5,868 75
July 11.	John Franey, collector town and city tax	14 43
July 19.	H. C. Deming, collector income tax	262 30
July 28.	Conn. River Banking Co., for $3,000 U. S. Reg. 6's, 1881	3,492 75
1872.		
Feb. 28.	Cash paid M. W. Graves, cashier, for $4,000 U. S. Reg. 6's, at 114 7/16, and charges	4,581 00
April 23.	Cash paid for $4,000 U. S. Reg. 6's, 1881, at 114 7/16, and charges	2,305 50

1872.			
July	3.	John Franey, collector town tax list of 1871	$17 81
		John Bulkley, collector city tax list of 1871	22 92
		H. C. Deming, collector income tax 1871	254 92
		Tax on list of 1872, $4,500, at 24 mills	108 00
			$218,695 45
		By balance	8,357 25
			$227,052 70

Received, Hartford, January 11, 1873, of the trustees above-named our respective portions of above balance, and of the principal trust estate in 500 shares of stock of Colt's Pat. Fire-arms M'f'g Co., and releases given to trustee.

ISABELLA C. DEWOLF,
By F. E. DEWOLF, *Attorney.*
SAM'L POMEROY COLT.
LEBARON B. COLT.

[*Exhibit* 13[1]. *E. E. M., Ex'm'r.*]

Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of 500 shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz.:

Shares	125
Cash	$31,759 01

In consideration whereof I hereby release, discharge, and
224 acquit the said Colt, Hubbard, and Jarvis, trustees as aforesaid, of and from any and all further accountings, actions, or causes of actions for and on account of said trust.

LEBARON B. COLT. [SEAL.]

JANUARY 11, 1873.

[*Exhibit* 13[2]. *E. E. M., Ex'm'r.*]

Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, by proportional sale of 500 shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz.:

Shares	125
Cash	$31,750 01

In consideration whereof I hereby release, discharge, and acquit the said Colt, Hubbard, and Jarvis, trustees, as aforesaid, of and from any and all further accountings, actions, or causes of actions for and on account of said trust.

January 11th 1873.

SAMUEL P. COLT. [SEAL.]

[*Exhibit* 13³. *E. E. M., Ex'm'r.*]

Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of 500 shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz.:

Shares	125
Cash	$31,759 01

In consideration whereof I hereby release, discharge, and
225 acquit the said Colt, Hubbard, and Jarvis, trustees, as aforesaid, of and from any all further accountings, actions, or causes of actions for and on account of said trust.

January 11, 1873.

ISABELLA COLT DEWOLF. [SEAL.]
By F. E. DEWOLF, *Attorney.*

[*Exhibit* 13⁴. *E. E. M., Ex'm'r.*]

Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of 500 shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz.:

Shares	125.
Cash	$31,759 01

In consideration whereof I hereby release, discharge, and acquit, the said Colt, Hubbard, and Jarvis, trustees as aforesaid, of and from any and all further accountings, actions, or causes of actions for and on account of said trust.

THEODORA DEW. COLT. [SEAL.]
Assignee by purchase of residue of E. D. Colt's estate remaining after settlement of administrator's account.
By H. C. ROBINSON, *Her Attorney.*

[*Exhibit* 14. *E. E. M., Ex'm'r.*]

Received, Hartford, January 11, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of two thousand nine hundred seventy-five dollars and twenty-four one-hundredths ($2,975.24), being our full

proportional interest and share in the balance of said estate in hands of said executors, as per their final administration account this day rendered and accepted in the court of probate. And having
226 previously received in full the various other sums, legacies, annuities, devises, and distributions coming to us under said will and previous settlements and administrations to our entire satisfaction, we hereby, in consideration thereof, release, discharge, and acquit the said Colt, Hubbard, and Jarvis, executors as aforesaid, of and from any and all further accountings, actions, and causes of action, excepting, however, the question of our interest in the remainder of the $574\frac{6}{31}$ shares of the capital stock of the Colt's Patent Fire-arms Manufacturing Co. bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined.

ISABELLA C. DEWOLF, [SEAL.]
By F. E. DEWOLF, *Attorney.*
SAMUEL P. COLT. [SEAL.]
LEBARON B. COLT. [SEAL.]
THEODORA DEW. COLT, [SEAL.]
Assignee by purchase of the estate of Edward D. Colt remaining after settlement of administrators' account.
By HENRY C. ROBINSON, *Her Attorney.*

[*Exhibit* 15. *E. E. M., Ex'm'r.*]

Estate of Samuel Colt, late of Hartford, deceased.

At the court of probate holden at Hartford, in and for the district of Hartford, on the eighth day of June, 1866. Present: James Nichols, judge.

Ordered, That the fifteenth day of June, 1866, at 10 o'clock a. m., be, and the same is, assigned for the exhibition and allowance of the executors' account with said estate; and this court directs the executors to give public notice to all persons interested therein to appear and be heard thereon, by publishing this order in a weekly newspaper published in Hartford and posting a copy on the public sign-post in the town where the deceased last dwelt, and return make to this court.

Attest: LUCIUS TUTTLE, *Clerk*

227 At a a court held on the second day of July, 1866. Present: James Nichols, judge.

The settlement of this account is adjourned to this date.

The executors made return, and gave satisfactory evidence that, pursuant to the order of this court, made on the eighth day of June, 1866, they gave public notice of the time and place assigned for exhibiting and allowing the executors' account by publishing said order in a weekly newspaper published in Hartford, and posting a copy on the public sign-post in the town where the deceased last dwelt, which this court finds to be true; and after a full hearing of

all persons interested in said estate this court accepts of said return of notice, and Henry C. Robinson appears for Samuel Caldwell Colt, Isabella DeWolf Colt, Edward D. Colt, LeBaron Colt, and Samuel Pomeroy Colt; and after a full hearing and examination of the account the same is accepted, allowed, ordered, recorded, and kept on file.

Attest: LUCIUS A. TUTTLE, *Clerk.*

The Executors of Estate of Samuel Colt in Account with the Estate of Samuel Colt.

To	* * * * * * * *		
	By cash paid * * *		
1866.			
May 31.	By cash paid intestate estate, the back dividends on 500 shares of stock of company each, primary legacy to Sam'l J. Colt, deceased	$75,000	00
	Primary legacy to Eliz. E. Colt, deceased	75,000	00
	574 6/21 shares of the stock of the company, each, residuary legacy to Sam'l J. Colt, deceased,	86,225	75
	Residuary legacy to Eliz. E. Colt, deceased	86,225	75
	Interest on the same at the rate of 3 per cent. per annum, primary legacy to Sam'l J. Colt, deceased	4,805	14
228			
1866.			
	By cash paid primary legacy to Eliz. E. Colt, deceased	4,805	14
	Residuary legacy to Sam'l J. Colt, deceased	5,534	71
	Residuary legacy to Eliz. E. Colt, deceased	5,534	71
	(Income taxes deducted and reserved, as per other side of this account.)		

1866.	By cash paid Jas. B. Colt, the back dividends on 574 $\frac{26}{31}$ shares stock of the company, being a residuary life legacy, as ordered by the court	$86,225 75	
	Interest on same, at the rate of 3 per cent., as ordered	5,534 71	$91,760 46
	Payment divided as follows:		
	Woodruff & Beach Iron Works, as assigned by J. B. C.	$3,192 50	
	Hiram Bissell and S. D. Sperry, also assigned by J. B. C.	7,662 31	
	James B. Colt, balance	80,905 65	91,760 46
	(Income taxes deducted as other side of account and reserved.)		
	By cash paid Mrs. Samuel Colt, the dividends of Sept. 11th, 1862, of $30 per share on 1,000 shares stock of the company, being primary life legacy	30,000 00	
	Nov. 29, 1862, of $20 per share on same stock	20,000 00	
	Sept. 11, 1862, of $30 per share on 50 shares stock of the company, being primary legacy	150,000 00	
	Nov. 29, 1862, of $20 per share on same stock	1,000 00	
	Back dividends 1,149 $\frac{21}{31}$ shares stock, being a residuary life legacy, $172,451.59; do. on 57 $\frac{15}{31}$ shares, $8,622.64,	181,074 23	
	Interest on back dividends on 1,149 $\frac{21}{31}$ shares of stock, at the rate of 3 per ct. per annum	11,069 47	

1866.	Interest on back dividends on 571 5/31 shares of stock, at the same rate	$553 47	$245,197 17
229			
	By cash paid R. W. H. Jarvis, administrator on estate of Henrietta S. Colt, the dividends of Sept. 11, 1862, of $30 per share on $500 shares stock, being a primary legacy to said Henrietta	15,000 00	
	Nov. 29, 1862, of $20 per share on same stock	10,000 00	
	Back dividends on 574 26/31 shares stock, being a residuary legacy to said Henrietta	86,225 75	
	Interest on back dividends on 574 26/31 shares, at the rate of 3 per cent. per annum	5,534 71	116,760 46
	By cash paid Isabella D. W. Colt, the dividends of Sept 11, 1862, of $30 per share on 100 shares of the stock of the company, being a primary legacy	3,000 00	
	Nov. 29, 1862, of $20 per share on same stock	2,000 00	
	Back dividends on 114 30/31 shares stock, being a residuary legacy	17,245 22	
	Interest on back dividends on 114 30/31 shares, at the rate of 3 per cent. per annum	1,106 94	23,352 16
	By cash paid Caldwell H. Colt, the dividend of Sept. 11, 1862, of $30 per share on 500 shares of the company stock, being a primary legacy	15,000 00	
	Nov. 29, 1862, of $20 per share on same stock	10,000 00	
	Back dividends on 574 26/31 shares stock, being a residuary legacy	86,225 75	

1866.	Interest on back dividends on 574 2/31 shares of stock, being a residuary legacy, at the rate of 3 per cent. per annum	$5,534 71	$116,760 46
	By cash paid estate of E. K. Root, the dividends of Sept. 11th, 1862, of $30 per share on 50 shares stock of the company, being a primary legacy	1,500 00	
230	By cash paid estate of E. K. Root, Nov. 29, 1862; of $20, per share same	1,000 00	
	Back dividends on 57 16/31 shares stock, being a residuary legacy	8,622 62	
	Interest on back dividends on 57 15/31 shares, at the rate of 3 per cent. per annum	553 47	11,676 09
	By cash paid estate of L. P. Sargeant, the dividend of Sept. 11, 1862, of $30 per share on 50 shares stock of the company, being a primary legacy	1,500 00	
	Back dividends on 57 15/31 shares stock, being a residuary legacy	8,622 62	
	Nov. 29, 1862, of $20 per share, same stock	1,000 00	
	Interest on back dividends on 57 15/31 shares, at the rate of 3 per cent. per annum	553 47	11,676 09
	By cash paid R. D. Hubbard, the dividend of Sept. 11, 1862, of $30 per share on 50 shares stock of the company, being a primary legacy	1,500 00	
	Nov. 29, 1862, of $20 per share on same stock	1,000 00	
	Back dividends on 57 14/31 shares of stock, being a residuary legacy	8,622 62	

1866.	Interest on back dividends on 571 5/31 shares of stock, at the rate of 3 per cent. per annum	$553 47	$11,676 09
	By cash paid R. W. H. Jarvis, the dividend on 50 shares of the company, being a primary legacy	1,500 00	
	Nov. 29, 1862, of $20 per share on same stock	1,000 00	
	Back dividends on 571 5/31 stock, being a residuary legacy	8,622 62	
	Interest on back dividends on 571 5/31 shares, at the rate of 3 per cent. per annum	553 47	11,676 09
231	By cash paid Sam'l C. Colt, back dividends on 574 26/31 shares stock of the company, being a residuary legacy	57,483 82	
	Interest on the above at the rate of 3 per cent. per annum	2,419 09	59,902 91
	By cash paid Edward D. Colt, back dividends on 114 30/31 shares stock of the company, being a residuary legacy	3,449 04	
	Interest on the above at the rate of 3 per cent. per annum	33 72	3,482 76
	(All the above legacies and interest are paid by order of the court.)		
	By cash paid * * * *		
1866. June 18.	By trust fund, 500 shares of company stock, set aside to trustees for Christopher Colt's children, as per will	------	100,000 00
	By R. W. H. Jarvis, administrator, 1,074 26/31 shares stock of the company	------	214,967 74

1866.			
June 18.	By Caldwell H. Colt, 1,074 $\frac{26}{31}$ shares stock of the company	$214,967 74	
	Real estate devised to him by will	40,000 00	$254,967 74
	By Samuel H. Colt, 1,074 $\frac{26}{31}$ shares of stock of the company	214,967 74	
	Triangular and building devised to him by will	12,500 00	227,467 74
	By Isabella D. W. Colt, 214$\frac{30}{31}$ shares stock of company	------	42,993 55
	By Edward D. Colt, 214$\frac{30}{31}$ shares stock of company	------	42,993 55
	By Mrs. Samuel Colt, 107 $\frac{15}{31}$ shares stock of company	21,496 74	
	Homestead devised to her by will	170,000 00	191,496 74
	By estate of L. P. Sargent, 107$\frac{15}{31}$ shares stock of company	------	21,496 76
	By R. D. Hubbard, 107$\frac{15}{31}$ shares stock of company	------	21,496 76
232			
	By estate of E. K. Root, 107$\frac{15}{31}$ shares stock of company	------	21,496 76
	By R. W. H. Jarvis, 107$\frac{15}{31}$ shares stock of company	------	21,496 76
	By real estate situated in Massachusetts, viz.:		
	In Wales	1,500 00	
	In Northampton	240 00	1,740 00
1866.			
June 30.	By cash paid Mrs. Samuel Colt, her commissions as executrix	------	13,468 26
	By cash paid R. D. Hubbard, his commission as executor	------	13,468 26
	By cash paid R. W. H. Jarvis, his commission as executor	------	13,468 26
	By cash paid probate fees		311 00

1866.			
June 30.	*By cash amount reserved for future contingencies as follows:		
	U. S. bonds	$100,000 00	
	Cash	60,000 00	$160,000 00
	By balance		2,170,884 43
			$4,848,651 98
	By real estate (less devised)		$491,562 00
	By cash		217,319 19
	By farm stock and tools, Hartford		1,975 25
	By farm stock and tools, East Hartford		35 00
	By brick yard tools, and wood		326 90
	By U. S. 6 per cent. bonds of 1881		18,000 00
	By stock, bonds, and scrip as follows:		
	996 shares of stock of Willow Ware M'f'g Co	4,980 00	
233	620 shares stock of Union Ferry Co.	3,100 00	
	100 shares stock of Hartford and N. Y. Steamboat Co.	2,500 00	10,580 00
	Stock of Colt's Pat. Fire-arms M'f'g Co., held in reserve for—		
	Mrs. Samuel Colt, life interest, 2,149 $\frac{31}{31}$ shares	429,935 48	
	James B. Colt, life interest, 574 $\frac{26}{31}$ shares,	114,967 73	
	LeBaron Colt, minor, 214 $\frac{30}{31}$ shares	42,993 55	
	S. Pomeroy Colt, minor, 214 $\frac{30}{31}$ shares	42,993 55	630,890 31

*This item is reserved for the following purposes: For payment of United States and State taxes on lists and income tax of 1865, and U. S. taxes on income of 1866.

For payment of annuities, and legacies when of age, to LeBaron B. and Samuel P. Colt, as per will.

For suit of Edward D. Colt *vs.* Executors, now pending in the superior court, for Hartford county.

For J. B. Colt appeal from probate, pending in same court, and for other unsettled litigations and controversies, and for expenses and contingencies.

Intestate Estate.

1866.				
June	30.	Samuel J. Colt, deceased primary legacy, 500 shares	$100,000 00	
		Residuary legacy, 574 26/31	114,967 74	
		Elizabeth E. Colt, deceased, primary legacy, 500 shares	100,000 00	
		Residuary legacy, 574 26/31 shares	114,967 74	$429,935 48
		Balance due on dividends		316,260 30
				$2,170,884 43

R. D. HUBBARD,
R. W. H. JARVIS,
Executors.

At a court held on the second day of July, 1866. Present: James Nichols, judge.

The executors having settled their account with said estate, there remains for distribution the sum of $793,798.34 in real and personal estate, according to the will, and that there is for distribution, as intestate estate, the sum of $746,195.78 in real and personal estate, and that the distributees consist of Elizabeth H. Colt, widow, Caldwell H. Colt, and Henrietta J. Colt, of whom R. W. H. Jarvis, is administrator.

Ordered, That the real and personal estate of said deceased be distributed among the heirs of said deceased, and this court appoints Nathaniel H. Morgan, Nathan M. Waterman, and Edwin
234 D. Tiffany, Esquires, disinterested and judicious persons, to distribute the estate as follows: The testate estate according to the will of the deceased, and the intestate estate one-third to said E. H. Colt, and one-third to C. H. Colt, and one-third to Henrietta J. Colt, to be held by her administrator, R. W. H. Jarvis, and return make to this court.

Attest: LUCIUS TUTTLE, *Clerk.*

At a court held on the fourteenth day of July, 1866. Present: John H. White, judge.

The executors made return of the distribution of said estate, which is accepted, and recorded Vol. 76, page 291.

Attest: GEORGE D. BISSELL, *Clerk.*

Distribution of the Estate of Samuel Colt, Deceased.

To the Honorable the Court of Probate for the District of Hartford:

The undersigned, distributors on the estate of Col. Samuel Colt,

late of Hartford, deceased, respectfully report that, having been appointed distributors on said estate by said court on the second day of July, 1866, and duly sworn according to law, we have set out and distributed said estate, both testate and intestate, as hereinafter described; and for a further description of the real estate hereinafter described and distributed, reference is made to a certain map of the premises appended to the report of appraisers on said estate, dated 1862, and on file in said probate court, and to the lots and parcels of real estate as therein numbered.

Testate Estate.

We have distributed the testate estate devised by said deceased to the persons and in proportions following, viz.:

To Mrs. Elizabeth Hart Colt,	$\frac{12}{18}$ths parts	12
Samuel Caldwell Colt,	$\frac{2}{18}$ths parts	2
Isabella DeWolf Colt, Edward D. Colt, LeBaron Colt, and Samuel P. Colt,	each $\frac{1}{18}$th part	4
		18

235 *Intestate Estate.*

We have also set out and distributed the intestate estate of Col. Samuel Colt, deceased, viz.: To Elizabeth H. Colt, widow of deceased, one-third part thereof; to Caldwell Hart Colt, son of deceased, one-third part thereof; and to Richard W. H. Jarvis, as administrator on the estate of Henrietta J. Colt, deceased, daughter of said Samuel Colt, one-third part thereof, according to the order of said probate court, as follows, viz.:

To Mrs. Elizabeth Hart Colt, viz.:

717$\frac{21}{30}$ shares of the capital stock of Colt's Patent Fire-arms Manufacturing Co.	$143,535 48
Cash to equalize her share	105,196 45
	$248,731 93

To Caldwell H. Colt, viz.:

716 shares of the capital stock of said Colt's Patent Fire-arms Manufacturing Co.	$143,200 00
Cash to equalize his share	105,531 93
	$248,731 93

To Richard W. H. Jarvis, as administrator on the estate of Henrietta J. Colt, deceased:

716 shares of the capital stock of said Colt's Patent Fire-arms Manufacturing Co.	$143,200 00
Cash to equalize his share	105,531 93
	$248,731 93

Respectfully submitted,

N. H. MORGAN,
N. M. WATERMAN,
E. D. TIFFANY,
Distributors under Oath.

HARTFORD, *July 14th*, 1866.

Estate of Col. Samuel Colt, late of Hartford, Deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the first day of August, 1870. Present: John H. White, judge.

Ordered, That the fifth day of August, 1870, at 2 o'clock p. 236 m., be, and the same is, assigned for the exhibition and allowance of the executors' supplementary administration account with said estate; and this court directs the executors to give public notice to all persons interested therein to appear and be heard thereon, by publishing this order in a daily newspaper published in Hartford and posting a copy on the public sign-post where the deceased last dwelt, and return make to this court.

Attest: P. F. BUTLER, *Clerk.*

At a court of probate holden at Hartford, in and for the district of Hartford, on the fifth day of August, 1870. Present: John H. White, judge.

Estate of Samuel Colt, late of Hartford, in said District, deceased.

The executors on the estate of Samuel Colt, late of Hartford, deceased, made return and gave satisfactory evidence that, pursuant to the order of this court, made on the first day of August, A. D. 1870, they gave public notice of the time and place assigned for exhibiting and allowing the executors' supplementary account, by publishing said order in a daily newspaper published in said Hartford, and posting a copy on the public sign-post in the town of Hartford, where the deceased last dwelt, which this court finds to be true, and said executors gave satisfactory evidence that the following-named persons, being all the parties in interest in said estate, were personally notified to be present at the settlement of said account, viz.: Mrs. Elizabeth H. Colt, for herself and as guardian of Samuel C. Colt, and both of said Hartford; Isabella Colt DeWolf, of Newport, in the State of Rhode Island; LeBaron B. Colt, of the city and State of New York, and H. C. Robinson, of Hartford, attorney of said LeBaron B. Colt; Samuel Pomeroy Colt, of Bristol, in the State of Rhode Island, a minor, and Theodora D. W. Colt, of Bristol, in the State of Rhode Island, guardian of Samuel P.

Colt, which this court finds to be true; and after a full hearing of all persons interested in said estate, this court excepts said return of notice and excepts and allows said account, and the same is ordered to be recorded and kept on file.

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Attest: P. F. BUTLER, *Clerk.*

Executors of Estate of Samuel Colt in account with the Estate of Samuel Colt.

1866.			
July 5.	By cash paid Mrs. T. DeW. Colt, guardian, quarterly payments on annuities to L. B. and S. P. Colt	$250	00
	By cash paid H. T. Sperry, town tax	4,691	39
	By cash paid H. H. Fitch, city tax	4,275	48
	By cash paid J. G. Bolles, income tax, 1865	21,179	10
	By cash paid fees to distributors of estate	360	00
	By cash paid 2 notes to order of C. C. Dobson, as per agreement, on sale of Arizona mining stock, with H. D. Poston	1,330	00
	By cash paid Mrs. T. D. W. Colt, guardian, quarterly payments on annuities to L. B. and S. P. Colt	250	00
	By cash paid brokerage on sale of U. S. 6 per cent. of 1881	78	23
	By cash paid E. D Colt, on account of accrued dividends on residuary bequest in stock of Colt's Arms Co., during his minority	11,000	00
	By cash paid brokerage on sale of U. S. 6 per cent., 1881	15	64
	By cash paid Anderson, collector of E. H. taxes	104	84
1867.	By cash paid Mrs. T. D. W. Colt, guardian, quarterly payments on annuities to L. B. and S. P. Colt	250	00
	By cash paid E. D. Colt in full for accrued dividends on residuary bequest as above	2,777	20

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	By cash paid Mrs. T. D. W. Colt, guardian, dividends on residuary bequest in stock of Colt's Arms Co. to L. B. and S. P. Colt, each $17,432\frac{42}{100}$	34,864	84
	By cash paid Samuel C. Colt, for accrued dividends during minority on residuary bequest in stock of Colt's Arms Co	30,420	46
	By cash paid trust fund of children of Christopher Colt, dividend of Colt's Arms Co. on 500 shares	2,500	00

1867.	By cash paid Mrs. T. D. W. Colt, guardian, annuities for year 1867, for L. B. Colt	$291 66
	By cash paid Mrs. T. D. W. Colt, guardian, annuities for year 1867, for S. P. Colt	500 00
	By cash paid for $2,000 Conn. State Bonds transferred to trust estate of Caldwell H. Colt, on account of rents of real estate devised to him in trust	1,945 00
	By cash paid for $6,000 Conn. State Bonds in trust for C. H. Colt, on same account	6,015 00
	By cash paid Mrs. T. D. W. Colt, guardian, dividends due L. B. and S. P. Colt, on residuary bequest in stock of Colt's Arms Co	2,299 36
	By cash paid trust fund for children of Christopher Colt, dividends Colt's Arms Co	5,000 00
	By cash paid Warren & Bonner, bill of mdse. furnished at mine in Arizona stock	68 65
	By cash paid H. A. Grant, collector, income tax, 1866	6,210 15
	By cash paid returned to sundry parties as excess of sum reserved to pay taxes, as follows:	
	Mrs. E. H. Colt	1,925 15
	Mrs. E. H. Colt, guardian	1,581 35
239		
	By cash paid Samuel C. Colt	574 38
	E. K. Root	57 48
	L. P. Sargeant	57 48
	R. D. Hubbard	57 48
	R. W. H. Jarvis	57 48
	E. D. Colt	114 96
	Isabella D. W. Colt	114 96
	L. B. Colt	143 70
	S. P. Colt	143 70
	Trust fund	1,000 00
	J. B. Colt	574 83
	By cash paid legacy to L. B. Colt, at majority	2,500 00
	By cash paid brokerage of sale of $5,000 U. S. 6 per cent., 1881	1 56
	By cash paid J. H. White, probate fees	21 50
	By cash paid Mrs. T. D. W. Colt, guardian, dividends for S. P. Colt, on residuary bequest in stock of Colt's Arms Co	1,150 00

1867.	By cash paid John Borden, balance on bill	$79 73
	By cash paid trust fund for children of Christopher Colt, dividends Colt's Arms Co.	5,000 00
1868.	By cash paid for $5,000 Conn. State bonds, transferred to trust estate of Caldwell H. Colt, on account of rents of real estate, devised to him in trust	5,000 00
	By cash paid Mrs. T. D. W. Colt, guardian, annuity for 1868, S. P. Colt	500 00
	By cash paid Mrs. T. D. W. Colt, guardian, dividend for S. P. Colt, on residuary bequest of stock on Colt's Arms Co	575 00
	By cash paid trust fund for children of Christopher Colt, dividends Colt's Arms Co.	2,500 00
	By cash paid John Franey, collector, town and city tax	291 42
	By cash paid trust fund for children of Christopher Colt, dividends Colt's Arms Co.	5,000 00
240		
	By cash paid Mrs. T. D. W. Colt, guardian, dividends for S. P. Colt, on residuary bequest in stock of Colt's Arms Co.	1,150 00
1869.	By cash paid Mrs. T. D. W. Colt, guardian, annuity, for 1869, S. P. Colt	500 00
	By cash paid Mrs. T. D. W. Colt, guardian, div. for S. P. Colt on residuary bequest stock of Colt's Arms Co.	1,150 00
	By cash paid trust fund for children of Christopher Colt, dividends Colt's Arms Co.	5,000 00
	By cash paid H. C. Deming, collector income tax	221 45
	By cash paid trust fund for children of Christopher Colt, dividends, Colt's Arms Co.	2,500 00
	By cash paid Mrs. T. D. W. Colt, guardian, dividend for S. P. Colt on residuary bequest in stock of Colt's Arms Co	575 00
	By cash paid for Conn. State bonds transferred to trust estate of Caldwell H. Colt on account of rents of real estate devised to him in trust	500 00
	By cash paid John Franey, town and city tax, in July	318 78

1869.	By cash paid Mrs. T. D. W. Colt, guardian, annuity for 1870, S. P. Colt	$500 00
	By cash paid for $3,000 Kansas Pacific R. R. bonds, transferred to trust estate of Caldwell H. Colt, on account of rents of real estate devised to him in trust	2,935 41
	By cash paid Mrs. T. D. W. Colt, guardian, div'd for S. P. Colt, on residuary bequest of stock of Colt's Arms Co.	575 00
	By cash paid trust fund for children of Christopher Colt, dividend Colt's Arms Co.	2,500 00
241		
1870.	By cash paid Colt's Arms Co., for sundry expenditures for account of estate, as per account rendered	1,637 06
	By cash paid H. C. Deming, collector income tax	209 20
	By cash paid John Franey, collector town and city tax for estate	838 10
	By cash paid town and city tax for C. H. Colt trust	343 00
	By cash paid R. D. Hubbard, Esq., for sundry disbursements since date of distribution, as per account rendered	134 72
	By cash paid amount retained to balance account with trust fund for account of C. H. Colt	729 73
	By amount reserved for part of annuities to S. P. Colt for pending litigation and other contingencies	10,390 54
	By balance for distribution	65,000 00
		$263,408 50
1866.	Cash received * * * * *	

HARTFORD, *Aug. 5th*, 1870.

R. D. HUBBARD,
R. W. H. JARVIS,
Executors.

Estate of Samuel Colt, late of Hartford, Deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the sixth day of January, 1873. Present: John H. White, judge:

Ordered, That the tenth day of January, 1873, at 10 o'clock a. m., be, and the same is, assigned for the exhibition and allowance of the executors' account with said estate; and this court directs the exec-

utors to give public notice to all persons interested therein to appear and be heard thereon, by publishing this order in a daily newspaper published in Hartford, and posting a copy on the
242 public sign-post in the town where the deceased last dwelt, and return make to this court.

Attest: P. F. BUTLER, *Clerk.*

Estate of Samuel Colt, late of Hartford, deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the tenth day of January, 1873. Present: John H. White, judge.

The executors made return and gave satisfactory evidence that, pursuant to the order of this court, made on the sixth day of January, 1873, gave public notice of the time and place assigned for the exhibiting and allowing of the executors' account, by publishing said order in a daily newspaper published in Hartford, and posting a copy on the public sign-post in the town where the deceased last dwelt, which this court finds to be true; and after a full hearing of all persons interested in said estate, this court accepts of said return of notice, and allows said account.

Attest: P. F. BUTLER, *Clerk.*

Executors' Account with the Estate of Samuel Colt.

CR.

1872.				
Jan.	3.	Cash paid Mrs. T. D. W. Colt, guardian, amount brought forward	$9,261	44
		Annuity for year 1872, to Sam'l P. Colt	500	00
Jan.	15.	Cash paid $3,000 Conn. State Bonds for fund held in trust for C. H. Colt	3,005	00
Apr.	16.	Cash paid T. D. W. Colt, guardian, div. on 115 shares stock, residuary legacy to Samuel P. Colt	345	00
		Cash paid Trust Fund div. on 500 shares stock held in trust for heirs of Christopher Colt	1,500	00
July	2.	Cash paid Frank Bulkley, collector, city tax, list of 1871	470	35
243				
July	3.	Cash paid John Franey, collector, town tax, list of 1871	365	81
		Cash paid H. C. Deming, collector, income tax	42	57

1872.				
Aug. 7.	Cash paid Colt's Arms Company exchange on London for £25 2 9, amount paid to Prosper Polam, of Liege, in full of services rendered in connection with Belgian patent of Samuel Colt		$140 71	
Sept. 16.	Cash paid Hartford Trust Co. for $12,000 Hartford Capitol Bonds for fund held in trust for C. H. Colt		12,180 00	
1873.				
Jan. 1.	Cash paid amount due to fund held in trust for C. H. Colt, for collections to date, not invested		1,755 65	
	Cash amount to be reserved to pay tax on list of 1872, $14,000, at 24 mills		338 40	
	By balance		15,921 56	$45,826 49
Jan. 10.	Cash paid to S. P. Colt for legacy directed by will to be paid him on attaining his majority		2,500 00	
	Cash paid S. P. Colt, amount of annuity due him for time from Jan. 1st, 1873, to Jan. 10th, date of his majority		13 69	
	Cash paid R. D. Hubbard, Esq., bill for sundry disbursements and including probate fees paid by him, $4.50		19 25	
	Balance		13,388 62	15,921 56

1870.		DR.		
Aug. 5.	Fund retained by executors at date to meet legal expenses and for other contingencies		10,390 54	
	Amount collected for fund held in trust for C. H. Colt, in hand of executors at date		729 73	
244				
Oct. 1.	Interest to date on balance at Hartford Trust Co.		326 41	

1870.			
Nov. 1.	Dividend on 715 shares stock of Colt's Arms Co., 500 held in trust for heirs of Christopher Colt, and 215 primary and residuary legacies to Sam'l P. Colt	$3,575	00
	Coupons Kansas Pac. R. R. Bonds, held in trust for Caldwell H. Colt—coin, $105; premium, $11.03	116	03
1871.			
Jan. 1.	Coupons on $13.500 Conn. State Bonds, held in trust for C. H. Colt	405	00
Feb. 1.	Interest to date on balances at Hartford Trust Co.	172	06
Feb. 11.	Net proceeds of claim against William T. Coleman, cash received from his attorneys as per terms of settlement	2,850	00
April 3.	Dividend on 715 shares stock of Colt's Arms Co., held by executors, as above stated	3,575	00
May 1.	Interest to date on balances at Hartford Trust Co.	147	05
July 1.	Coupons on $13,500 Conn. State Bands, $405.00; coupons on Kansas Pac. R. R., coin, $118.12, held in trust for C. H. Colt	523	12
Aug. 1.	Interest on balances at Hartford Trust Co.	160	68
July 24.	Cash from State treas. for $1,000 coin bond called on for redemption, belonging to fund held in trust for C. H. Colt	1,000	00
Oct. 30.	Dividends on 715 shares stock of Colt's Arms. Co., held by executors, as above stated	2,145	00
Nov. 1.	Interest to date from Hartford Trust Co.	169	53
	Coupons Kansas Pac. R. R. Bonds, held in trust for C. H. Colt, $105; prem., $8.92	113	92

245

1872.				
Jan.	1.	Coupons on $2,500 Conn. Bonds, held in trust for C. H. Colt	$375 00	
Feb.	1.	Interest to date from Hartford Trust Co.	169 16	
April	16.	Dividends on 715 shares stock of Colt's Arms Co., 500 held in trust for heirs of Christopher Colt, and 215 primary and residuary legacies, to Samuel P. Colt	2,145 00	
May	1.	Coupons on Kansas Pac. R. R. Bonds held in trust for C. H. Colt, $105; $12.60	117 60	
		Interest to date from Hartford Trust Co.	142 63	
July	1.	Coupons on Conn. [—] held in trust for C. H. Colt	435 00	
July	25.	Cash received from State treasurer, for $1,000 bond held in trust for C. H. Colt, called in for redemption with interest mat.	1,010 00	
		Proceeds of sale of $11,500 Conn. State Bonds, held in trust for C. H. Colt	11,547 91	
Aug.	1.	Interest to date from Hartford Trust Co.	168 33	
Nov.	1.	Interest to date from Hartford Trust Co.	212 67	
		Coupons on Kansas Pac. R. R. Bonds, held in trust for C. H. Colt, $105; $12.34	117 34	
1873.				
Jan.	1.	Coupons $12,000 Hartford Capitol Bonds, and 3,000, State do. $90, held in trust for C. H. Colt	450 00	
		Cash received from fund held in trust for C. H. Colt, for taxes chargeable to said fund, paid by estate, with interest	2,420 00	
		Interest to date, bal. in Hartford Trust Co	116 68	
				$45,826 49

1873.
Jan. 1. Balance on hand for distribution to date $15,921 56

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Jan. 10. Balance on hand for distribution 3,388 62

HARTFORD, *January 10th*, 1873.

R. D. HUBBARD,
R. W. H. JARVIS,
Executors.

Estate of Samuel Colt, late of Hartford, Deceased.

Explanatory Statement showing the course of Administration of the Assets of the Estate.

At our settlement in 1866 we set aside of the stock of Colt's Fire-arms Co., as follows:

1. For the trust created for the children (except the eldest) of Christopher Colt, number of shares, 500.

Also held in reserve under the will, as follows:

2. For Mrs. Samuel Colt for life, remainder to children, number of shares, $2,149\frac{21}{31}$.

3. For James B. Colt and assignees for life of said James B., title to remainder undetermined (see Colt *vs.* Colt, 33 Conn., 270,) number of shares, $57\frac{26}{31}$.

4. For LeBaron Colt, (then a minor, primary legacy when he should become of age, 100 shares; residuary legacy (since decided to be absolute,) $114\frac{30}{31}$ shares, (see Colt *vs.* Hubbard, 33 Conn., 281,) number of shares, $214\frac{30}{31}$.

5. Pomeroy Colt, same amounts of stock and under same conditions, viz., number of shares, $214\frac{30}{31}$.

We have since disposed of the above-named estate in the following manner:

1. We have settled with the beneficiaries above named, and transferred to them the five hundred shares and balance of accumulations thereon, the youngest of said beneficiaries having become of age.

2. We have executed a power of attorney to Mrs. Samuel Colt, authorizing her to draw the dividends which may accrue to her during her life, on the $2,149\frac{21}{31}$ shares of stock bequeathed to her for life.

3. We have executed to James B. Colt and his assignees powers of attorney to draw the dividends which may accrue during
247 the life of the said James B. Colt on the $57\frac{26}{31}$ shares bequeathed to the said James B. Colt for life.

4. We have transferred to LeBaron Colt the $214\frac{30}{31}$ shares,

primary and residuary legacies, bequeathed to him as per No. 4, on first page hereof, the said LeBaron having become of age.

5. We have also transferred to S. Pomeroy Colt the 214$\frac{30}{31}$ shares bequeathed to him as per No. 5, on second page hereof, the said Pomeroy having become of age.

There remains undisposed of—

1. For the benefit of whomsoever may be entitled thereto, the remainder in the 574$\frac{26}{31}$ shares bequeathed to James B. Colt for life as per No. 3, on first page hereof.

2. Also the remainder in the 2,149$\frac{24}{31}$ shares bequeathed to Mrs. Samuel Colt for life, which remainder, subject to said life estate, passes by said will to the issue of the testator.

The remainder of the estate on hand at the administration settlement of 1866, not specifically devised, was distributed under the order of the probate court, and was delivered over to the distributees respectively. (See decree of distribution in probate records.)

January 13, 1873.

ELIZABETH H. COLT,
R. D. HUBBARD,
R. W. H. JARVIS,
Executors.

I hereby certify that the above and foregoing are true and correct copies of record, estate of Samuel Colt, deceased.

HENRY E. PHIPPS, *Clerk.*

248 [*Exhibit* 16. *E. E. M., Ex'm'r.*]

JAMES B. COLT
vs.
ELIZABETH H. COLT, Executrix and others.

Bill in equity. Same as reported in 32d Conn. Facts now found by agreement and sundry specific questions reserved by the superior court for the advice of this court.

Record read by C. E. Perkins for pet'r. } 15 m. after 11.
C. Chapman for pet'r. }
(See very full printed brief on file.)

Authorities Cited.

2 Williams's Executors, 1106, and note.
2 Sneed, 387. Gourley *v.* Thompson.
2 Merivale, 362, 385. Seake *v.* Robinson.
2 Grant's Cas., 28. Fulton *v.* Fulton.
36 Penn. S. R., 120. Diehl's Appeal.
15 Conn., 274–291.
4 Harrington, 55. State *v.* Warrington's Executors.
Grassick *v.* Drummond, 1 Sim. & Stu., 517.
Coope *v.* Banning, *Id.*, 531.
1 Jarman on Wills, 292 *et seq.*

15 Vesey, 410, 416. Dawson *v.* Clark.
21 Eng. Law and Eq., 122.
14 Jurist, 25. Cole *v.* Scott.
2 Williams's Executors, 1105 and note.
20 Eng. C. L., 374. Moreton *v.* Fosseck.
11 Jurist, 34.
14 Simons, 2. Walsh *v.* Gladstone.
9 Simmons, 515. Hall *v.* Severne.
249 1 Merivale, 22. Henwood *v.* Overend.
2 Collyer, 341. Early *v.* Benbow.
13 Vesey, 379. Bonner *v.* Bonner.
Bett's Supplement to Vesey, 333. Fuller *v.* Hooper.
5 Eng. L. and Eq., 185. Stilwell *v.* Mellersh.
15 Jurist, 13. Doe *v.* Hole.
2 Roper on Legacies, 1250.
13 Vesey, 325, 333. Wood *v.* Penoyre.
Williams's Executors, 1283.
30 Beavan, 268.
1 Dev. Ch. (N. C.), 368. Johnson *v.* Person.
9 Gill and J., 115. Thomas *v.* Frederick County School.

(5 m. after 12 adjourned to 2 p. m.)

Mr. Chapman resumed argument. (2 p. m.)
(Closed 16 m. before 3.)
N. Shipman for H. C. Deming.
(See brief on file.)

Authorities.

1 P. Wms., 333.
1 Sim & Stu., 237. Dix *v.* Reed.
2 Russell, 585. Cockerell *v.* Barber.
2 Collyer, 201. Compton *v.* Bloxham.
17 Eng. Law and Eq., 466.
16 Beav., 550.
17 Jurist, 569.
17 Beavan, 301.
18 Jurist, Digest, 220.
1 DeG. & Swale, 34. Furch *v.* Secker.
11 Simons, 202. Griffiths *v.* Pruen.
12 *Id.*, 264. Christian *v.* Devereux.
28 Jurist, 383. Hoare *v.* Osborne.
21 Beav. 518.

(Closed 22 m. after 3.)
H. C. Robinson for children of Christopher Colt.
(See brief on file.)

Authorities.

1 Manle and Selw., 299. Goodlittle *v.* Southern.
1 Baur and Ald., 550. Doe. *v.* Earl of Jersey.
250 4 Brown C. C., 55. Sherer *v.* Bishop.

17 Simons, 108.
2 Bland, 314. Hammond *v.* Hammond.
5 DeG. and Sm., 481. Warwick *v.* Hawkins.
7 Simons, 446. Phillips *v.* Allen.
1 Ves., p. 279. Seacroft *v.* Maynard.
2 Ves., p. 449. Crowder *v.* Clowes.
5 Id., 504.
3 Merivale, 154. Cooper *v.* Day.
17 Pick., 182.

(Closed 3 m. after 4.)

Macfarland for executors and other principal respondents. (See very full printed brief on file.)

Authorities.

1 Roper on Legacies, 873.
2 White and Tudor Lead. Cases in Eq., 549. Hare & Wallace ed.
1 Kay, 128.
1 White and Tudor Lead. Cases in Eq., 626. Hare & Wallace ed.
4 Beav., 561. Day *v.* Croft.
5 Id., 289. Bristow *v.* Bristow.
1 Vesey, p. 279. Seacroft *v.* Maynard.
3 Id., 73. Wordsworth *v.* Younger.
2 Id., 449. Crowder *v.* Clowes.
3 Id., 286 note. Long *v.* Long, (case contained in a note.)
6 Conn., 305. Greene *v.* Dennis.
1 Roper on Legacies, 467.
Id., 780.
2 Williams's Executors, 1153.
Knight *v.* Gould. 2 Mybne & Keen, 295.
9 Simons, 515. Hall *v.* Severne.
22 Conn., 386.
41 N. Hamp., 205. Wendell *v.* French.
13 Serg. and Watts, 199. Stewart *v.* Stocker.
3 Binney, 295. Delaware Ins. Co. *v.* Delaunie.
4 Mass., 170.
251 4 Met., 1. Oriental Bank *v.* Tremont Ins. Co.
Donat's Civil Law, p. 1904.
22 Conn., 386.
13 Wend., 639. Stevens *v.* Barringer.
Sedg. on Dam., 377.
23 Wend., 525. McLaughlin *v.* Washington Co. Mut. Ins. Co.
1 Abbott, adm'r, R., 588. The Isaac Newton.
1 Blatchf. C. C., 596. Norman *v.* Shorer.
12 Vesey, 386. Bruere *v.* Pemberton.
6 Hare, 66.
10 Eng. Law and Eq., 224. Williams *v.* Powell.
Hill on Trustees, 386.
14 Gray, 276. Johnson *v.* Bridgewater Iron Man'g Co.

Hill on Trustees, 386.
Tiffany and Bull on Trusts, 619.
8 Conn., 363.
13 *Id.*, 41.
13 Pick., 328.
Hill on Trustees, 386.
Tiffany and Bullard on Trusts, 483.

(15 m. before 6 adjourned 9 Thursday morning.)

THURSDAY MORNING, *March* 1, 1866.

Macfarland resumes his argument (8 m.)
Further authorities cited.
To the point that an executor not acting cannot take a legacy given him as executor.
13 Vesey, 418. Stackpoole *v.* Howell.
10 Jurist N. S., 922. *In re* Hawkin's Will.

(Closed 22m. before 11.)
O. S. Seymour on same side for executors and principal respondents.
(10 m. before 12 adjourned to 2 p. m.)
(Argument resumed 5 m. after 2 p. m.)
(Closed 15 m. after 2.)
T. C. Perkins in reply.
(Closed 22 m. before 5.)

252 And on the 6th day of December, complainants' rebuttal evidence was filed in the words and figures following, viz.:

Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH H. COLT *et al.* } In Equity.

Testimony for Complainant in Rebuttal.

253 U. S. Circuit Court, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH H. COLT *et al.* } In Equity.

It is hereby stipulated and agreed between the parties that the testimony in writing of Theodora DeW. Colt, Sam'l P. Colt, and LeBaron B. Colt, may be taken before Walter H. Barney, Esq., notary public for the county of Providence, State of Rhode Island, to be used in said case, and in the proceedings thereof, in the same manner and with the same effect, in all respects, as if the same were taken before an examiner in this case, regularly appointed by the court; and the parties waive all objection that might or could be

made to such use of said testimony, taken as aforesaid, by reason of the taking of the same before an officer other than an examiner, appointed as aforesaid.

CHAS. E. PERKINS,
Solicitor for Defendants.
A. & A. D. PAYNE,
FRANCIS COLWELL,
For Complainants.

254 Circuit Court of the United States, District of Connecticut.

LeBaron B. Colt *et al.*
vs.
Elizabeth H. Colt *et al.*
} In Equity.

Evidence for Complainants in Rebuttal.

Taken by agreement before Walter H. Barney, Esq., notary public, at Providence, Rhode Island, Friday, Oct. 8, 1880.

Present: Messrs. Ashley and Colwell, for complainants; Messrs. Perkins and Hyde, for respondents.

Theodora G. DeW. Colt, recalled, sworn:

Direct examination by L. C. Ashley, Esq., counsel for complainants:

Interrogatory 1. I observe that your direct testimony was given under the name of Theodora G. Colt, and as you use other initials here for additional middle names, will you please explain the difference here, so as to prevent all confusion?

Answer. DeWolf was my maiden name, and I like to retain it. Then it was Theodora G. DeWolf; after my marriage I called my name Theodora G. DeWolf Colt, but I sometimes sign it as Theodora G. Colt, and at other times as Theodora G. DeW. Colt.

255 Int. 2. Have you read the testimony given by Henry C. Robinson in behalf of the defendants in this case?

Ans. I have.

Int. 3. State now, after having read that testimony, whether you have any reason to think or say any differently from what you testified to in your direct examination, heretofore had, in regard to your never having employed said Robinson in the James B. Colt case therein referred to.

Ans. I make no change; I never employed, or caused to be employed, Henry C. Robinson, in behalf of my children or myself, in the James B. Colt suit; I left that suit for the executors to defend, thinking that they were bound to protect the interests of all legatees under the will, including those of my children.

Int. 4. After reading Mr. Robinson's testimony, have you any reason to make any different statement in relation to there being a second suit for dividends?

Ans. No; I knew that there was a question pending concerning

the back dividends, but did not know that there was any regular suit.

Int. 5. State whether you had any such conversation with Mr. H. C. Robinson as that testified to by him in his answer to question No. 6 of his examination, in which he says that you congratulated him, or yourself, or perhaps both together, upon his being your counsel.

Ans. I never had any such conversation; I never congratulated Mr. Robinson, and never had any reason to congratulate him, because he was never employed by me as my lawyer; I never had but one conversation with Mr. Robinson in regard to the James B. Colt suit; he came to me one evening after a theatrical performance at Hartford, and spoke to me in the hall, and told me that he thought my children required a lawyer in said suit, and solicited em-
256 ployment; I told him that I did not intend to oppose Judge Colt's suit personally, and consequently required no lawyer; that the executors would oppose it on their own behalf, and likewise on that of my children; and that I considered that there was nothing more necessary to be done; I never employed Mr. Robinson as a lawyer.

Int. 6. State whether or not you gave any authority; and, if so, what authority to your son, Edward D. Colt, to engage Mr. Robinson as your counsel in the James B. Colt case?

Ans. I never gave him any authority to engage Mr. Robinson as counsel in the James B. Colt case, or any other.

Int. 7. State what, if anything, you did or said at any time to ratify the employment of Mr. Robinson as counsel in that case.

Ans. I never said or did anything to ratify it. I did not wish to oppose Judge Colt's case, and consequently did not require a lawyer. I left that for the executors to do, deeming it all sufficient.

Int. 8. Now, after the first decision in that case allowing Judge Colt's claim, did you employ or authorize the employment of Mr. Robinson as counsel in any of the subsequent proceedings in that case?

Ans. I did not, still deeming it unnecessary, as I thought that the trustees were bound to protect the interests of my children in any and every question that might arise.

Int. 9. Did you ever do or say anything to ratify or assent to any such employment?

Ans. I never did, for the reason above given.

Int. 10. State what you know about the check for $32,364.84 referred to by Mr. Robinson as given by him in the dividend suit.

257 Ans. I know nothing. I never saw the check. I know that there was such a sum of money paid to my agent, George D. Colt, but any fees that Mr. Robinson may have taken from the sum collected could not have been for services in the James B. Colt suit or anything connected therewith, as I never employed Mr. Robinson as my lawyer. I never wrote to him on the subject of the

back dividends, or upon anything connected with the case. I never advised with him in any way, and I never regarded him as my lawyer.

Int. 11. State the circumstances relative to the power of attorney given by you to H. C. Robinson, dated Jan. 14th, 1873.

Ans. I have a recollection of some paper being handed me at that time, which I was told to sign. I was at Bristol, Rhode Island, and was told that if I did not sign it I could not get the money coming to me from the estate of my son Edward.

Int. 12. Have you read the testimony, as it has been printed, of the defendant, Governor Hubbard, taken on behalf of the defendants in this case?

Ans. I have.

Int. 13. Please to state whether you had a conversation with Governor Hubbard before the trial of the demurrer in the James B. Colt case, in relation to the question whether you would oppose Judge Colt's claim in that case; and, if you had such a conversation, please state what it was.

Ans. I had such a conversation about a year after Colonel Colt's death; Mr. Hubbard asked me if I did not intend to oppose the Judge's suit in behalf of my minor children; I replied, "No;" and he said, "Why not?" I said, "Because my children's interests, as I understand, are identical with those of the other legatees. It is the intention, I believe, of the executors to oppose
258 his claim to the best of their ability, consequently my children's interests will be protected sufficiently." He said that my opposing it personally, would strengthen the case against him; that my children's interests were involved in the suit. I said, "How?" and he replied, "By decreasing the general residuum." I said that that would only make a difference to them of a few shares of stock; and he said that those were worth contending for. I replied, "You will attend to that, and I wish to avoid making a personal enemy of Judge Colt, if possible. Mr. Hubbard never hinted to me that my children's interests were further endangered, or that there was any possibility of their being endangered, in any way that would not be protected by the executors and trustees.

Int. 14. What, if anything, did Governor Hubbard say in that conversation in relation to the intention of the executors to oppose the claim of Judge Colt in that suit, and to protect the rights of all the beneficiaries, and in relation to the employment of counsel for that purpose?

Ans. He said that it was his intention to oppose Judge Colt's suit; that very able counsel had been employed, named Judge Curtis. He further said that Judge Colt had no case; that no one but a fool or a madman would would ever think of bringing such a case into court; but that if such was the Judge's intention, that they would defend it to the best of their power.

Int. 15. What, if anything, did he say about the various interests

opposed to the claim of Judge Colt, and in relation to protecting all of them by the opposition which the executors should make?

Ans. He said that the interest of all the legatees were one and identical. That they were all included in the suit opposed to Judge Colt. And he said that they would all be protected by the executors. That the more opposition, the stronger would be the defence.

259 Int. 16. Did you have any other conversation with Governor Hubbard about the James B. Colt case before the allowance of Judge Colt's claim was made by the decision on the demurrer?

Ans. I had no conversation with him about the James B. Colt case.

Int. 17. Did you, at any time, request or authorize Mr. Henry C. Robinson to make any, and, if so, what, applications to the trustees for enlarged allowances or advances to your children?

Ans. I did not.

Int. 18. State whether you, at any time, employed or authorized the employment of Henry C. Robinson in the matter of the executors' accounts of the estate of Samuel Colt in the probate court.

Ans. No; I never did.

Int. 19. Did you ever go to Mr. Robinson's office, or have any correspondence with him, or any other communications, excepting what you have already referred to, in any way touching the James B. Colt case, or the proceedings upon the executors' accounts?

Ans. I never did; Mr. Robinson was never my lawyer.

Int. 20. State whether, at any time during the progress of the James B. Colt case, the communication of the fact that your children's interests in the Samuel Colt estate might be seriously endangered or impaired came to you from Governor Hubbard. From what source did you receive that communication, and what was done in consequence of it?

Ans. Governor Hubbard never intimated such a thing to me; my son Edward told me that Judge Colt intended to bring up
260 the point whether my children were entitled to the residuum, on the five hundred shares left to them by their uncle in trust. I immediately sought an interview with Judge Colt, and obtained a promise from him to withdraw that point. And I then sought an interview with his lawyer, Mr. Chapman. Mr. Chapman said, "Judge Colt will withdraw that point by my advice, and has already done so." I said, "Then it will not be brought up;" and he said, "No." Because the executors were morally bound to defend my children's interests as though they were their own; that being trustees of the property, it was in fact the same as their own.

(All conversations with Mr. Chapman, who is deceased, and not a party to the suit, is objected to for those reasons by the counsel for the defendants.)

WITNESS. I considered Mr. Chapman as my lawyer, and I con-

sulted with Mr. Chapman, and not with Mr. Robinson, when any difficulty arose. I wrote Mr. Chapman about the back dividends.

Int. 21. State whether you had any communication with Governor Hubbard, after the decision was made upon the demurrer allowing Judge Colt's claim, in relation to what action you would then take for the protection of your children's rights in such determinations as might be further made in that case; and, if so, state what such communication or conversation was.

Ans. I never had any such communication or conversation with Governor Hubbard. I never learned either from or through Governor Hubbard that my children's rights were endangered, further than the few shares involved. I thought the only person I had to fear was Judge Colt; and after he had withdrawn the point, I felt perfectly easy, not deeming it a possible thing that the executors could bring it up, having been told by Governor Hubbard
261 that they were bound to protect my children's interests the same as their own. I never employed Mr. Robinson as a lawyer, not seeing the slightest necessity for my so doing, and consequently never told Mr. Hubbard that I had done so.

Int. 22. Did you say to or inform Governor Hubbard that you had confidence in the executors, although so far as he was concerned personally you had no ill feeling or distrust, and tell him that you did not wish to discuss the matter of the James B. Colt case with him any further?

Ans. I have no recollection of making such a remark to Governor Hubbard in regard to the executors. If I did, it could not have been in connection with the James B. Colt suit, for I had been told by him and others that the executors were not only morally but legally bound to protect my children's interests in that suit, and I did not deem it possible that they could do otherwise. I never told him that I did not wish to discuss the James B. Colt suit any further with him.

Int. 23. Did you say to, or in any way inform, Governor Hubbard, as stated in his testimony, in his answer to question 3d thereof, that Henry C. Robinson was the counsel of yourself and children, or that, considering the relations which were existing, the family preferred to have their own independent counsel for the maintenance of their rights?

Ans. I never had any such conversation or communication with Mr. Hubbard as that referred to by Mr. Hubbard in his testimony, and I never made any such communications as those referred to in the question.

Cross-examination waived by counsel for respondents.

THEODORA G. DEW. COLT.

Subscribed and sworn to before me, this eighth day of October, A. D. 1880.

WALTER H. BARNEY,
Notary Public.

262 SAMUEL P. COLT, recalled, sworn:

Direct examination by Mr. ASHLEY:

Interrogatory 1. Were you present, and did you hear the testimony given by H. C. Robinson and the defendant, R. D. Hubbard, in this case?

Answer. I was present during all of Mr. Robinson's testimony, and all but the very latter part of Mr. Hubbard's, and what I did not hear I have read.

Int. 2. In view of the testimony of said Robinson, please to state whether you now have any reason to think that you ever in any way employed him, or assented to or approved his employment in the case of James B. Colt, referred to in his testimony.

Ans. I never did.

Int. 3. State what authority, if any, was ever given by you to your brother, Edward D. Colt, to so employ him.

Ans. None whatsoever.

Int. 4. State whether you ever did or said anything, and, if so, what, in the way of ratifying such employment by Edward D. Colt.

Ans. I never did or said anything. I never knew that there was such a person as Mr. Henry C. Robinson till some time after the close of the J. B. Colt litigation.

Int. 5. Also state, in view of the testimony given by H. C. Robinson and Governor Hubbard, whether you have any reason to think that you at any time employed or authorized the employment of said Robinson in the matter of the executors' accounts, or any proceedings in the probate court, or that you approved of, assented to, or ratified any such employment.

Ans. I never did; I did not know till December, 1878,
263 just before the bringing of this present suit, that Mr. Robinson had appeared in any matters connected with the settlement of the executors' accounts in the probate court, or that he had anything whatsoever to do with said accounts; I never ratified or approved it in any way.

Int. 6. State whether you were ever present at any conversation between your brother, LeBaron B. Colt, and H. C. Robinson, in regard to the James B. Colt case.

Ans. I never was till about the time of the bringing of this present suit.

Int. 7. State whether or not you were in the supreme court room, or any court-room in Connecticut, during the trial there of any part of the James B. Colt case.

Ans. I recollect of being present once, and once only. This, I think, was at the first trial, when I was about twelve years old. I went into the court-room with some other boys, where they told me Judge Colt's case was being tried. I recollect of seeing Judge Colt sitting there, and also recollect of seeing Charles Chapman. They two were the only persons I saw that I knew. I listened a

while to the proceedings, but, not comprehending the significance of what was going on, I did not stay long.

Int. 8. Did you know or understand what the trial was about?

Ans. I did; I knew they were trying Judge Colt's case, but I hadn't the remotest idea it was a matter in which I was concerned.

Int. 9. State the circumstances of the signing of the receipts produced by Governor Hubbard, and marked Defendants' Exhibits, 13^1, 13^2, 13^3, 13^4, and Exhibit 14, and what connection, if any, Mr. Robinson had therewith.

264 Ans. I received a letter from Mr. Hubbard while I was pursuing my studies at the Massachusetts Institute of Technology, in Boston, dated December 30th, 1872, which letter I here produce, marked "Complainants' Exhibit I," to which I replied, informing Mr. Hubbard that I would be of age on the 10th instead of the 12th of the following January; my reply was produced by Governor Hubbard, and is marked "Defendants' Exhibit 9^5;" I went from Boston to Hartford on the 9th of January, 1873, arriving at the Allyn House on the afternoon of that day; I did not see Mr. Hubbard until the following morning, the 10th, when, in company with my brother LeBaron and Mr. F. E. DeWolf, we called at his office; we found Mr. Hubbard engaged in the trial of a case in court, so that he could not attend to the matter upon which we had come till the following day; we were somewhat disappointed, as we were in haste to go to Bristol, where my mother had prepared a birthday party; on the following morning, the 11th, by appointment with Mr. Hubbard the previous day, we again called at his office, where we found him ready to close the matter of the trust. We, Mr. Hubbard, Mr. DeWolf, my brother LeBaron, and myself, being the only persons present, and Mr. Hubbard holding in his hands a paper, which he said was a part of the trust account coming down to that time, which he offered to show to us, but which none of us examined; said that the time had come when this trust property should be paid over to us, and read off from the account the amount of the accumulations which, as I recollect it, were in round numbers $132,500; Mr. Hubbard also spoke at this time in a kind of a joking way of Judge Colt, and said that he was crazy, and if I recollect correctly, read us some letters which he had there from Judge Colt, which certainly went to confirm Mr. Hubbard's statement of insanity; there was also some little time spent in talking about other crazy proceedings of Judge Colt; and the fact of his having been in the insane asylum was referred to. The subject of compen-

265 sation for the trustees was then mentioned, and I recollect that it was a surprise to us, as we had understood that no compensation was to be charged, owing to the fact that the trustees received compensation under the will as executors. There was silence for a moment when Mr. Hubbard proposed sending for Mr. Robinson, as he had had experience in other similar matters and would be better able to judge what compensation would be fair than he (Mr. Hubbard) would be. Mr. Robinson was thereupon

sent for by Mr. Hubbard and came over hastily from his office or the court-house, remarking, as he came in, that he could remain but a moment, as he had left some business, or some one waiting and must return. Mr. Hubbard told him, at the same time handing him the account which I have referred to, that what he wished to know was what would be a fair compensation for the trustees to charge, remarking that he knew that he (Mr. Robinson) had had some experience in such matters. Mr. Robinson took the account, turned the pages over till he came to the footing, asked Mr. Hubbard a few questions about the trust and how many years they had been trustees, and, after a few moments reflection, said: (He having previously referred to several other cases of trusts that he knew of, administered in Hartford, and the amount of compensation that had been charged,) "If this trust stood by itself, or if these trustees were separate parties from the executors of the will, I should say twelve thousand dollars would be a fair compensation." We were all considerably surprised, and Mr. DeWolf fairly turned pale. Mr. Hubbard then said, seeing how we felt, "What do you say to half that amount?" No one seeming inclined to speak, Mr. Hubbard suggested that we should step into the other room with Mr. Robinson, and let him (Mr. Hubbard) know what would be satisfactory. We did so, and Mr. Robinson reported, after a moment, that five thousand five hundred dollars would be satisfactory. Mr. Robinson then immediately left. Mr. Hubbard took the account and deducted the amount that had
266 been agreed to, and then said it would be necessary for us to go to the armory in order to receive the money and stock, as Mr. Jarvis was there, and also the books. We, Mr. Hubbard, Mr. DeWolf, LeBaron and I, then went to the armory, where we were met by Mr. Jarvis in his room there. Mr. Hubbard told him what had been agreed upon as compensation, and Mr. Jarvis opened his check-book and transfer-book of the armory stock, and proceeded to draw the checks and make out the transfers. During this time Mr. Hubbard was busy writing what he afterwards read to us as receipts—two of them—one to the executors, for the small balance coming to us from the general estate, and the other to the trustees, for the shares and moneys which we were about to receive. Mr. Hubbard said he wished us to copy them, and I well recollect that Mr. DeWolf would not do so, saying that he was too nervous to write. LeBaron started copying the trustee receipt, and Mr. Hubbard gave me the executors' to copy; I recollect, as he handed it to me, that the ink was not dry where he had drawn his pen through certain words; I also felt somewhat nervous, and I recollect that it troubled me, thinking my handwriting would look very badly, and of asking Mr. Hubbard whether the one he had just written would not answer; he said "No," that he did not want the erasures in it, and that he preferred to have it copied; so I copied it as best I could; I also started to copy one of the trustee receipts but I made a mistake, writing the word "condition" for that of "considera-

tion," and so LeBaron had to make all the copies of the trustee receipt. The executors' receipt was immediately signed by LeBaron, Mr. DeWolf, and myself, and we each also signed one of the trustee receipts; then the matter of receipting for Edward's share came up, and LeBaron said that he would receipt for that, as administrator of his brother. Mr. Hubbard then called to his (LeBaron's) mind that Edward's estate had been sold to mother, and that, therefore, she would be the proper party to receipt for Edward's share. LeBaron remarked that he
267 had forgotten all about that. Mr. Hubbard then said it would be necessary that mother should receive Edward's share; and upon our telling him that it would be very inconvenient for her to come on, he said it could be done by her giving a power of attorney; and LeBaron then asked him if he would see that such a power of attorney as would cover the ground, be prepared and sent to her at Bristol. There was also some conversation between LeBaron, Mr. DeWolf, Mr. Hubbard, and Mr. Jarvis, about paying certain assignments of a part of Edward's interest to Isabella and to LeBaron, and also certain assignments of a part of LeBaron's interest to the Hartford Trust Company. I have no recollection whatsoever of any seals, or scrolls, or L. S.'s, being upon any of the receipts at the time they were signed, or being put upon them afterwards; the scrolls upon the executor's receipt, which I drew, I have examined since that receipt was introduced into this case, and can say that they were not made by me; had I not have seen the receipts since their introduction into this case, I should have said with great confidence that they were not under seal, nor had anything upon them where a seal usually is; I may, of course, be mistaken about this matter of seals and scrolls, but I state my best recollections, and I am either correct when I say that they were not on at the time of signing, or put on at any time in my presence, or else the matter of the receipts made very little impression upon my mind, one way or the other, except as to the looks of the handwriting in the one that I copied. We then received from Mr. Jarvis checks for our respective shares of the trust accumulations, as shown to be due by the account, and also certificates of 125 shares each of the armory stock, and also checks for our respective shares of the balance shown to be due by the executors' account upon the general estate. I should have mentioned that Mr. Jarvis had, on our arrival in his room, the executors' account, which was offered to us to examine, but which we did not, being per-
268 fectly satisfied with Mr. Jarvis' statement of what remained undistributed, belonging to the estate; this would also apply to the trust account which was shown us by Mr. Hubbard, in his office, as I have said, and also brought by him to the armory. We were all entirely satisfied to take Mr. Hubbard's statement of what was coming to us on that account. There was no one present except the persons I have named, viz.: Mr. Hubbard, Mr. Jarvis, Mr. DeWolf, LeBaron, and myself, while we were at the armory, nor

did we see or consult with any one else relative to the matter, but left for home that afternoon.

Int. 10. Was anything said at the time about the James B. Colt decision as forming the basis on which the division was made?

Ans. There was no mention or reference to that decision whatsoever.

Int. 11. Did you know at that time of the decision of the court in that case in regard to your title to a proportion of the residuary stock in respect of the trust legacy of five hundred shares?

Ans. I did, and had not the slightest doubt but what that decision cut us off from all claim to those shares and the accumulations thereon.

Int. 12. How long was the interview at Governor Hubbard's office, and how long was Mr. Robinson there?

Ans. As near as I can estimate the time, I should say the whole interview lasted half an hour, and that Mr. Robinson was there not to exceed ten minutes.

Int. 13. State whether or not Mr. Robinson made an examination of the account in reference to any other matter than the compensation of the trustees, and whether he undertook to advise you, or any of you, upon any other matter in connection with the account.

269 Ans. He did not; he made no examination of the account, except as I have before stated, and did not give, and was not asked to give, any advice whatsoever, in regard to it.

Int. 14. At the interview at Governor Hubbard's office, was anything said by Governor Hubbard, and, if so, what, in relation to the executors desiring you to give them any release or discharge of everything under the will?

Ans. There was not, nor by anybody else.

Int. 15. Was there anything said at that interview by Governor Hubbard about the executors desiring a discharge, so that they might be forever put to rest in respect to everybody except Judge Colt?

Ans. There was not. I feel sure, and am confident of this, for I well recollect that while Mr. Hubbard was writing the receipts referred to, at the armory, I wondered what he was doing, and recollect that when he read them it took me by surprise, as up to that moment I had not thought of the matter of our giving receipts, or that any would be asked for, though, after hearing them, I did not see anything out of the way about them, and had no hesitancy in signing them.

Int. 16. State whether anything was said about the papers signed by you, releasing the executors for anything further than what you had received and what you had received. If anything of that kind was said, state what it was.

Ans. There was nothing whatsoever of the kind said, and I did not then, and never supposed that I was receipting or releasing for

anything except what I received and what I had received. I had not the remotest idea of such a thing.

Int. 17. State, whether previous to the receipt of Governor
270 Hubbard's letter, dated December 30th, 1872, you had or had not received from him any explanations in relation to the condition of the trust fund account; if so, state what they were.

Ans. I had never received any; and that letter was all I had received from him up to the time of my going to Hartford.

Int. 18. At the interview at Governor Hubbard's office, or at the interview at the armory, was there any, and, if so, what, examination of the executors' or trustees' accounts made by you, or any one?

Ans. I did not examine at all either account; I recollect that at the armory Mr. DeWolf took the executors' account into his hands while LeBaron and I were copying the receipts, but whether he examined it or not I do not know; this examination of Mr. DeWolf, if he made any, is the only one made in my presence, except the one of Mr. Robinson's, as to the compensation.

Int. 19. State whether or not the defendant, Governor Hubbard, gave you notice by mail that the executors' last account would be acted on by the court of probate on January 11th, 1873?

Ans. He did not; the only information I received from Governor Hubbard, and the only letter I received from him, anywhere about that time, was his letter of December 30th, which I have produced, marked "Exhibit I;" my letter to him, of January 2d, 1873, produced by him, was in answer to his letter of December 30th, which I have produced.

Int. 20. State whether or not, since the making of the receipts you have mentioned, the executors have paid you any further sum or sums coming to you from the estate of Samuel Colt?

Ans. They have; I received about the 25th of March,
271 1875, from Mr. Robinson, as acting for the executors of the Samuel Colt estate, my one-sixteenth share, that being the proportion which I took under the will of the general estate of Samuel Colt in respect to my legacy of $2,500 therein given, being one-sixteenth of $2,490, which was the proceeds from the sale of some land in Wales, Massachusetts, inventoried with the assets of Samuel Colt's estate, as appears by the inventory. The deed of this whole property was drawn by Mr. Robinson, and he acted for all the legatees in interest in distributing the proceeds.

SAM'L P. COLT.

Subscribed and sworn to before me, this eighth day of October, A. D. 1880.

WALTER H. BARNEY, *Notary Public.*

LeBaron B. Colt, recalled, sworn:

Direct examination by Mr. Ashley:

Interrogatory 1. Were you present, and did you hear the testi-

mony of Henry C. Robinson and the defendant, R. D. Hubbard, in this case?

Answer. I was present; I heard their testimony, and have since read it.

Int. 2. In view of their testimony, state whether you now have any reason to think that you ever employed, or assented to, or approved of the employment of Henry C. Robinson as counsel in the James B. Colt case, referred to in his testimony.

Ans. I never did employ Mr. Robinson, and to the best of My recollection, never assented to such employment. In the progress of the James B. Colt litigation Mr. Robinson did not talk with me in Pomeroy's presence.

272 Int. 3. State what authority, if any, was ever given by you to your brother, Edward D. Colt, to employ Mr. Robinson in that case.

Ans. None whatever.

Int. 4. In view of the testimony of Mr. Robinson and Governor Hubbard, please to state now whether you, at any time, employed or authorized the employment of said Robinson in the matter of the executors' accounts, or any proceedings in the probate court upon the estate of Samuel Colt, or whether you approved of, or assented to, or ratified any such employment.

Ans. I did not; I knew nothing about the executors' accounts, or that any such accounts had been filed in the probate court, for a long time after the rendering of the so-called final executors' accounts.

Int. 5. State whether you had a conversation with Mr. Robinson a few hours after the argument in the James B. Colt case, and expressed your regret that you had been unable to hear him.

Ans. To the best of my recollection, I never did.

Int. 6. With reference to the testimony of Henry C. Robinson, that he was originally retained in February, 1864, for the children of Christopher Colt, in all matters involving their interest in the estate of Samuel Colt, and that the first member of your family who retained him was Edward D. Colt, will you now please to state whether you ever gave any authority to Edward D. Colt so to do.

Ans. I did not; before and during the whole progress of this James B. Colt litigation, I was most all of the time absent from Hartford, at school or college; I paid no attention to the James B. Colt litigation. At the time when my brother Edward, or mother, informed me that the point was raised as to the residuum on

273 the trust stock, I did go with my mother to see James B. Colt one evening at his house, and he then agreed not to bring up the point.

Int. 7. Were you in the court-room of the probate court, at Hartford, at any time when any of the executors' accounts were pending, and question was raised in relation to the amount of the executors' fees, and did or not said Robinson submit said question to you as

testified in his answer to interrogatories No. 8 and No. 11 of his examination?

Ans. I never was in the probate court at Hartford at the time when any of the executors' accounts were allowed or pending, or when any matters were up having any relation to the will of Samuel Colt, or our interests thereunder. Mr. Robinson did not submit any such question to me, to the best of my recollection.

Int. 8. State whether you received from Governor Hubbard any letters or communications in relation to the trust account, or the executors; and, if so, will you please produce and annex them.

Ans. I received two letters from Governor Hubbard; the first one dated December 23d, 1872, to which my letter produced by Governor Hubbard, marked "Exhibit 9^2," is an answer; also, another letter from Governor Hubbard, dated December 24th, 1872, to which my letter produced by him and marked "Exhibit 9^1," is an answer. I offer these in evidence, marked "K" and "L.' Governor Hubbard sent me no letter notifying me that the executors' final account would be acted upon in the probate court on the 11th of January, 1873. I never knew as to the time of filing of any of the executors' accounts.

Int. 9. Please state the circumstances of your meeting Governor Hubbard at his office in Hartford, in company with your brother, S. P. Colt, and Mr. DeWolf, on the eleventh day of January, 1873, and of Mr. Robinson's connection with that interview, and also
274 the circumstances of the subsequent interview between you and them, and Governor Hubbard and Mr. Jarvis, on the same day at the armory, and of the signing of the receipts produced by Governor Hubbard, and marked Exhibits 13^1, 13^2, 13^3, 13^4, and Exhibit 14. State all that took place at said interview.

Ans. I arrived in Hartford from Chicago on the evening of Jan. 9th, 1873, the next morning I went with my brother Samuel P. Colt, and F. E. DeWolf to Mr. Hubbard's office. We found Mr. Hubbard was engaged in court, and that we could not see him with respect to our business that day. The next morning, Jan. 11th, we all again went to Mr. Hubbard's office and found him there. I recollect of his having a paper of some kind in his hand, and that he then told us the amount of the accumulations on the five hundred shares of stock. He also referred, in a not very serious way, to James B. Colt, and spoke of the absurd letters he had received from him. The matter of compensation to the trustees then arose. At Mr. Hubbard's suggestion, Mr. Robinson was sent for and came in. The subject of compensation was then discussed, and I recollect Mr. Robinson's naming a large sum, as it seemed to us,—the precise amount I don't recollect,—as the sum that he considered would be a fair compensation for the trustees. I recollect Mr. Hubbard's saying, in substance, "How would half that sum strike you?"; that we then retired with Mr. Robinson and afterwards returned and told Mr. Hubbard that $5,500 would be satisfactory. Mr. Robinson, I recollect, was in a hurry to return to his office,

and left us then. I should think Mr. Robinson was not with us over ten minutes. I recollect distinctly that he said he was very busy and that parties were waiting for him. Governor Hubbard, my brother, Mr. DeWolf, and myself, then went to Colt's Armory, and met Mr. Jarvis, the co-executor and trustee, there. Mr. Jarvis immediately set to work drawing off checks, that were then paid us.

275 Mr. Hubbard, I recollect, was engaged in writing a paper, or papers, which proved afterwards to be the receipts. I recollect, upon his reading what he had written, that they excited in us more or less surprise, because we had no previous knowledge that receipts of any character were to be called for. I remember Mr. DeWolf's declining to copy one or the other of the receipts, on the ground that he felt too nervous. I know that I assisted to a greater or less extent in copying the receipts, also that my brother, Pomeroy, assisted. The whole matter took but a short time, and I know that I was very anxious to get the money upon that day, and at as early an hour as I could, for I had some settlements that I wanted to make. I paid little attention to the receipts. I relied upon Governor Hubbard in the whole matter. I don't think that I even looked at any of the accounts, trust account or executors', that may have been there. I have no recollection that either of the receipts purported, or had actually a seal attached, or anything in the nature of a seal or scroll. My recollection about this matter is the same as testified to by my brother. I recollect also, as he testifies, as to the difficulty in obtaining the share passing to my brother Edward's estate. I was administrator on my brother Edward's estate, and thought his share would be paid over to me. Governor Hubbard suggested that mother was the proper person to whom the money should be paid, and upon our suggesting the inconvenience of her coming to Hartford, Governor Hubbard proposed, as I recollect, that a power of attorney could be sent to her at Bristol. The checks were drawn by Mr. Jarvis. My check for the accumulation on the five hundred shares held in trust was not paid to me then, but Mr. Hubbard and myself went to the Hartford Trust Company, and the assignment I had made of my interest to secure a loan was then relieved by the payment of the amount due, and the balance paid to me. I would say here that no mention was made of our claim to the residuum on the five hundred shares of trust stock, nor was anything said, nor was it our intention to release for any sum, or for anything, except what had actually been received or paid over to us.

276 Int. 10. How long was the interview at the armory?

Ans. I should think not over a half hour.

Int. 11. At the interview at Governor Hubbard's office, did Mr. Robinson look at the account which Governor Hubbard had there; and, if so, how, and with what object?

Ans. I know he did not examine the account for the purpose of ascertaining its correctness, though he may have looked at it in order to compute the compensation for the trustees. There was no

examination by any one of the items contained in the trust account at that time, or at the armory, or at any other time. I trusted to Governor Hubbard in the matter.

Int. 12. Did or did not Mr. Robinson undertake to advise you upon any other matter, in regard to the account, excepting as to the compensation of the trustees?

Ans. He did not.

Int. 13. Was Mr. Robinson with you at the armory?

Ans. He was not.

Int. 14. State whether you told Governor Hubbard, at either of the interviews referred to, or whether your brother, Samuel P. Colt, or Mr. DeWolf told him that you or they had seen the account of the executors then lying filed in the court of probate for acceptance, and the explanatory statement of the account, and were entirely satisfied with it.

Ans. I did not tell Governor Hubbard so. I had not seen or examined the said account or the explanatory statement, nor did the others make that statement in my hearing. I never looked into any of the executors' accounts until within the past two years.

277 Int. 15. At the interview at Governor Hubbard's office, was there anything said by him, or by any one, about his wanting you to give the executors or trustees a full and complete discharge of everything under the will, so that they might be forever put to rest in respect to everybody exeept Judge Colt, or was anything said at that time about your giving them a release or discharge of any kind?

Ans. There was not; one reason why I know there was not is because of our surprise at the armory when Mr. Hubbard read off the receipts.

Int. 16. At the interview at the armory, was there anything said by anybody about your giving them a release or discharge for anything excepting what you had received, and were about to receive?

Ans. There was not.

Int. 17. Did you at that time suppose that you were giving them a release or discharge for anything more?

Ans. I did not.

WITNESS: I wish to add that in my letter of Dec., 27th, 1872, "Exhibit 9ª," the general statement of trust fund account referred to is the one embodied in the letter, to which this was in reply, and none other.

Int. 18. Had Governor Hubbard at any time explained the condition of the trust fund account to you, excepting at the times and to the extent and in the manner you have already stated in your testimony?

Ans. I am very sure I never spoke to Governor Hubbard personally about the condition of this account; I lived away from Hartford all this time; I have the impression, though, that when I was in Chicago, somewhere about 1872, I wrote Mr. Hubbard about the condition of the account, and that he replied to my letter, be-

cause I knew that the trustees had first invested the money, or a large part of it in Connecticut State bonds at a high price, and then sold them at a decline, and re-invested in Governments at
278 about 125. My impression is, that he stated to me in that letter in substance what the accumulation of the five hundred shares held in trust were then invested in. He never made any other explanation of the matter than that, and the other letters heretofore introduced.

Mr. L. C. Ashley, of counsel for the complainants, here states that the testimony of the two witnesses, S. P. Colt and LeBaron B. Colt, in relation to their recollection as to the receipts produced by Governor Hubbard, dated January 1, 1873, being or not being papers which contained seals or scrolls or any marks in place of seals affixed thereto, or inscribed thereon at the time said papers were signed, is not offered or introduced for the purpose of proving, or attempting to prove, that any of those instruments were altered after the signature thereof, by the affixing or insertion of any such seals or marks, but for the purpose of showing how the said instruments were at that time regarded by the signers thereof, and what the impression was which was made upon their minds at the time in relation to the character of the instruments signed, and the extent of their examination thereof, at the time of signing.

Cross-examination by A. P. HYDE, Esq., of counsel for the respondents:

X interrogatory 1. What is your present business?

Answer. A lawyer.

X int. 2. In your examination-in-chief you stated that you were born in 1846, and were absent as a student in Yale College during the pendency of the James B. Colt suit. State what year you graduated, and what year you were admitted to the bar.

279 Ans. I graduated in the summer of 1868; was admitted to the bar of New York in the summer of 1870; went abroad for about a year, and then went to Chicago.

X int. 3. Is your brother, S. P. Colt, also a lawyer, practicing in Providence, Rhode Island?

Ans. He is; he was admitted to the bar in 1877, I think.

X int. 4. Do you mean to be understood that during the litigation of the various matters relating to the Samuel Colt will, in which you and your family were interested, and in the several settlements made by the executors of that estate before the court of probate in Connecticut, you did not know that Henry C. Robinson was acting as counsel on behalf of yourself or the other children of Christopher Colt?

Ans. I do.

X int. 5. Do you mean to be understood that prior to the interview in Governor Hubbard's office, on the 11th of January, 1873, you never had conferred with Mr. Robinson in relation to the matters

connected with the said estate, or your interest therein, or known that he had acted as counsel for yourself or any of your family?

Ans. I know that I personally relied upon the good faith of the executors and trustees, and especially Governor Hubbard. I did know that Mr. Robinson appeared as counsel for my brother Edward in the back dividend suit, so called. I also knew or heard, after the proceedings were closed in the James B. Colt suit, that Mr. Robinson did take part at the final hearing in that suit. I would not say that, since some time after the close of those proceedings, when I have been in Hartford, I had not seen Mr. Robinson and talked with him in an unprofessional way, generally, about the will.

280 X int. 6. Did you inquire of Mr. Robinson, or of anybody else, who employed him to appear on behalf of yourself and the other children of Christopher Colt at that final hearing?

Ans. I did not. I was young, or under age, at that time; I had no idea any such point was to be raised, and when I did hear of it, as previously stated, a very short time before the final hearing, I thought, after seeing Judge Colt with my mother, the point as to our residuum on the five hundred shares would not be contested, and that the last persons to oppose our taking it would be the trustees.

The last answer objected to, as not responsive to the question, but the argument of a lawyer attempted to be interjected.

X int. 7. Did you know who represented your mother or you minor children in the first settlement which was made by the executors in 1866, on which settlement the sum of $34,864.84 was paid over by the executors to your mother as guardian for the minor children?

Ans. I knew nothing about such settlement. I paid no attention to it.

X int. 8. When, if ever, did you first learn that Mr. Robinson had deducted from the sum then received by him the sum of $2,500 on account of his services?

Ans. I first learned it when the check was produced by Mr. Robinson about a month ago, at his examination.

X int. 9. When you became of age, did your mother render you an account of the money she received as your guardian?

Ans. She did not. I never saw or heard of any account she ever rendered.

281 X int. 10. The second settlement of the executors seems to have been made in 1870, two years after you became of age; did you receive a distribution from the estate at that time amounting to $3,611$\frac{11}{100}$; and, if so, from whom did you receive that money?

Ans. I was in Europe at that time; I recollect my brother Pomeroy writing me that the amount had been paid; I received the

money from my brother Pomeroy, or rather he credited me with the money; I suppose that Mr. Robinson sent him a check for it; I think before going to Europe, thinking some money might be coming from the estate, I executed a power of attorney to Mr. Robinson to draw the money; I see that Mr. Robinson signed a receipt to the executors; as a matter of fact, I have no recollection of executing such a power of attorney to receipt for this money, but I do not suppose Mr. Robinson would have signed the receipt here exhibited unless he had authority from me to sign such receipt.

X int. 11. You have stated, as I understand you, that just prior to the settlement in 1873 you received no communications from Governor Hubbard, except the two letters you have produced marked Exhibits "K" and "L;" is that so?

Ans. I mean to swear that these are the only two letters I find; I see by Exhibit 9[3], my letter introduced by Governor Hubbard, that I refer to another prior letter; I have looked for that letter, but cannot find it.

X int. 12. Neither of the letters you have produced fixes any time when the distribution was to be made; when you came on the 9th did you know from a subsequent letter from Mr. Hubbard that the settlement was to be made on the 11th?

Ans. I suppose the settlement was to be made on the 10th—the day my brother came of age; I am quite positive I never received any subsequent letter from Governor Hubbard in relation to the matter.

282 X int. 13. You state that at the interview at Mr. Hubbard's office, on the 11th of January, 1873, Mr. Robinson was sent for at Mr. Hubbard's suggestion; who went for Mr. Robinson?

Ans. I do not recollect.

X int. 14. You state that, when at the armory, Mr. Hubbard prepared receipts for the several parties to sign, showing what they re-received, you were surprised; did that surprise come to you, as a lawyer, that he should require vouchers showing what he had paid over, or did the surprise arise from the form of the receipts that he required?

Ans. I can only say that I did not pay much attention to the matter, one way or another; that when Mr. Hubbard read off this long receipt we were surprised, because we were not expecting it. I was anxious to get the money, and paid little attention to it.

X int. 15. Were you, as a lawyer, surprised that the parties distributing a fund of $100,000 and more should require a voucher from the recipients, showing that they had received the fund, or did the surprise arise from the form and tenor of the receipt that he drew?

Ans. I can only say that I did not know that the executors had asked receipts when money had been paid before, and that when Mr. Hubbard read off this long receipt, it did strike us with more or less surprise.

X int. 16. Was there anything in the language of the receipt that surprised you?

Ans. I did not notice the language especially.

X int. 17. Then you mean to say that you were surprised that he should ask for a receipt at all?

Ans. I don't think that any of the parties, or myself certainly, thought about the matter one way or another.

LEBARON B. COLT.

283 Subscribed and sworn to before me, this eighth day of October, A. D. 1880.

WALTER H. BARNEY,
Notary Public.

Plaintiffs' counsel offer in evidence in the case all the exhibits which have been produced by the witnesses at this examination, and all exhibits produced by the witnesses in behalf of the complainants in the examination heretofore had.

[Copy.]

Complainants' Exhibit I. Walter H. Barney, Notary Public.

HARTFORD, CT., *Dec.* 30, 1872.

MASTER POMEROY:

I am told you will become of age on the 12th of next month. Allow me to congratulate you on the event—not only because of the event, but also because you have a handsome little sum of pocket money due you at that time.

You will be here on the 12th, will you not, to take the pocket money? We propose then to divide the trust fund and to make a final settlement of a small bal. due on the general estate. The trust fund consists of Government bonds, worth a premium of $16 or $17 perhaps; precisely how much they rule at I don't know. Do you wish us to convert the funds into cash? Your brother, L. B., wishes us to do so. Your sister advises us to do as we think best. What do you say?

For your information I will say that the fund will net, I think, about $130,000 in accumulations, in addition to the amounts allowed yourself and brother for education and the large amounts we have had to pay for taxes.

Yours, very truly, R. D. HUBBARD.

284 [Copy.]

Complainants' Exhibit K. Walter H. Barney, Notary Public.

HARTFORD, CT., *Dec.* 23, 1872.

MY DEAR SIR: I think on examining the trust acc. you will find the fund has been made reasonably productive. With me the first principle in the management of a trust fund is *security*. We invested the first proceeds in the first issue of Con. St. Bonds then selling at, say, 114 or 115. The progress of the war and the flood of bonds thrown upon the market—Government, States, counties,

and towns—depreciated this investment very badly. I cannot, however, think that anybody could at the time have criticised the investment. We afterwards changed to Government Bonds for the larger part.

The state of the fund now is—

U. S. Reg. 6s, 1881	93,000
Con. State, untaxable	17,000
Cash	5,147
	115,147
The premium in Gov. Bonds is, say	15,000
	130,000

Do you wish us to sell the bonds or divide up proceeds, or shall we divide the fund as it is?

Yours very truly, R. D. HUBBARD.

285 [Copy.]

Complainants' Exhibit L. Walter H. Barney, Notary Public.

HARTFORD, CT., *Dec.* 24, 1872.

DEAR SIR: Mr. Jas. B. Colt has just sent me a note informing me that suit will be brought to recover "his children's interest under the will of my (his) unfortunate brother, Samuel Colt," which he says were "revoked by undue influence, fraud, or mistake," and protesting against either you (myself) or other of the executors paying over the *principal* of the fund or property to any one in adverse interest to my (his) children." What in the world does the man mean? His object is to prevent the pay't of the trust fund to you. I cannot understand how he proposes to assert a title to this fund. What he has already received is only so much taken from your family—given to him in my judgment simply because he was poor—and which I did everything in my power to prevent.

I shall endeavor in this—as I always have done—to protect your just rights in anything which lies in my power.

Yours truly, R. D. HUBBARD.

286 And on the 29th day of November, 1880, defendants' additional evidence was filed in the words and figures as following, viz.:

United States Circuit Court, District of Connecticut.

LEBARON B. COLT *et al.* } In Equity.
vs.
ELIZABETH H. COLT *et al.* }

Defendants' Additional Evidence.

287 United States Circuit Court, District of Connecticut.

LEBARON B. COLT *et al.* } In Equity.
vs.
ELIZABETH H. COLT *et al.* }

It is hereby stipulated and agreed between the parties that the testimony in writing of Richard W. H. Jarvis and Henry C. Robinson may be taken before Henry E. Burton, Esq., a United States Commissioner, commissioned by the United States circuit court within and for the district of Connecticut, in the second circuit, to be used in said case and in the proceedings thereof, in the same manner and with the same effect, in all respects, as if the same were taken before an examiner in this case, regularly appointed by the court; and the parties waive all objection that might or could be made to such use of said testimony, taken as aforesaid, by reason of the taking of the same before an officer other than an examiner appointed as aforesaid.

Dated at Hartford, this 27th day of November, A. D. 1880.

L. C. ASHLEY,
Counsel for Complainants.
A. P. HYDE,
Counsel for Defendants.

288 United States Circuit Court, District of Connecticut.

LEBARON B. COLT and others } In Equity.
vs.
ELIZABETH HART COLT and others. }

Testimony taken before Henry E. Burton, United States Commissioner, at Hartford, in the State and District of Connecticut, on the 27th day of November, A. D. 1880, on behalf of the Defendants.

Present: Messrs. Ashley and Caldwell, for complainants; Mr. A. P. Hyde, for respondents.

R. W. H. JARVIS called by Mr. HYDE and sworn:

1. Name, age, residence, occupation.

Answer. Richard W. H. Jarvis; age, 51; residence, Hartford, Connecticut; occupation, manufacturer.

2. State whether you were one of the trustees and executors with Governor Hubbard and Mrs. Elizabeth H. Colt, under the will of Samuel Colt, late of Hartford, deceased.

A. I was.

3. State whether during the pendency of the suit brought by James B. Colt against the executors of said will, and the other parties interested therein, which cases were tried and decided by the supreme court of this State, and reported in the 32d and 33d vol-

umes of Connecticut Reports, you had any conversation with
289 Mrs. Isabella DeWolf Colt DeWolf, or with Mrs. Theodora G. DeWolf Colt, or with any of the children of Christopher Colt, with reference to the executors or trustees of Samuel Colt, defending their rights or interests in said suit; if so, state such conversation or conversations.

A. To the best of my recollection, I had no conversation with any of the persons named in reference to that suit. I am positive that I made no promises or assumed any obligation especially to protect their interest in that suit. I will explain that during our management of the estate it was my habitual practice to leave to Mr. Hubbard all legal questions affecting the estate. I wish to say further that at or about the time it became evident that the James B. Colt suit was to be pressed to trial I was led to believe that the parties named in the question had decided not to join in opposing the suit, and I considered that a sufficient reason for not consulting with them on that subject.

4. Mrs. Isabella DeWolf Colt DeWolf has testified that you, one of the trustees under the will of her uncle, Samuel Colt, had attended to her business generally, and particularly in connection with that suit, and that you had always said to her in the various interviews she had with you that you would protect her interest and advocate her claims in said suit; please state what the facts are in relation to this matter.

A. I think my previous answer applies to her statement that I had her interests particularly in charge in that suit. My business connection with this lady was simply the following: that at the time of the death of Col. Colt Mrs. DeWolf, then Miss Colt, resided in the same house with myself; as there was likely to be some considerable delay in the executors being able to pay over sums to the beneficiaries, I told her that I would willingly advance to her such moderate sums as she might need until such time as she might receive funds from the executors. I did so advance certain sums during the year 1862. In December of that year, I think it was, she received the sum of $5,000 through the executors, which, at her request, I took charge of and invested, I think, in Government securities of various kinds. Subsequently I received from her, for her account, about $3,000, of which I also invested the larger portion. During the years of 1863 and 1864 I had charge of her securities which I had purchased for her. I sold them at various
290 times by her direction, and paid over to her the proceeds. I also advanced during that time certain sums of which she was in need; and these transactions were in the years 1863 and 1864. Early in 1865, I think it was, I sold the last of these securities. In the meantime—I think in 1864—she had left our residence and taken house for herself. I had in no further sense the general charge of her interests than what I have stated.

5. During the trial of the case of James B. Colt, above referred

to, who acted as attorney and counsel for Mrs. Christopher Colt and her children, so far as you know?

(Objected to, as not being a matter competent to be proved by testimony of the witness in this manner.)

A. I know that Henry C. Robinson appeared as counsel representing their interests; beyond that I have no precise knowledge as to that.

6. State whether in January, 1867, any distribution of the estate, or payment of funds coming from the estate, was made to Mrs. Theodora DeWolf Colt as guardian, and, if so, what those payments were and how they were made?

A. In January, 1867, the sums due upon the residuary shares of stock, as dividends accrued during their minority, under the decision of the supreme court, were paid to the various legatees in interest. I do not distinctly recollect to whom, from my unaided recollection, I paid the sums for the two minor children, LeBaron B. Colt and Samuel P. Colt; but referring to my check book, I find that on January 16, 1867, I drew two checks payable to the order of Mrs. Theodora DeW. Colt, guardian; one for $17,432.42 for the benefit of the minor, LeBaron B. Colt, and one of the same date and amount for the benefit of S. Pomeroy Colt. These checks were drawn on the Phœnix Bank, of Hartford, and paid by the bank and charged to the estate.

7. Please state if you made any payments to Henry C. Robinson as attorney, either in fact or by power, either for Mrs. Theodora G. DeWolf Colt, or either of her children, during the settlement of the estate; if so, what payments, the amounts, and when?

A. I believe the first check that I paid to him as attorney was of the date of August 5th, 1870, for the sum of $3,611.11, as attorney for LeBaron B. Colt, under a power of attorney. No further
291 sums were paid to him as attorney, as I recollect, until 1873. Then I paid a check, dated January 10th, 1873, for the sum of $31,759.01 to the order of Henry C. Robinson, attorney. I wish to explain that that check was not given to him on the day it bears date; all the checks that were paid at the date of that settlement, January 11th, 1873, were dated as of the 10th, in order that that date might correspond with the date of S. P. Colt's majority, which was on the 10th. This check was retained until Mr. Robinson could obtain power of attorney from Mrs. Theodora Colt, and paid to him when he presented that power of attorney. This was given for a portion of the trust fund going to the estate of Edward D. Colt, deceased, which had been assigned to Mrs. DeWolf.

(Check laid in and marked Exhibit 17.)

On the same date, January 10th, 1873, a check for $743.81 was paid to H. C. Robinson, attorney, being the portion of the general fund remaining for distribution, going to the estate of Ed-

ward D. Colt. This was retained the same as the other, and paid over under the same power of attorney.

(Check laid in and marked Exhibit 18.)

8. You have spoken of a settlement made January 11, 1873, in reference to which these checks, dated January 10th, 1873, were drawn. Please state when and where that settlement was made, who was present, how long the parties present were together, and what was said and done on that occasion, as far as you can.

A. This settlement was made Jan. 11th, 1873, at my office, at Colt's armory, Hartford; Governor Hubbard, Mr. LeBaron B. Colt, Mr. Samuel P. Colt, Mr. DeWolf, and myself were present. My recollection is not entirely accurate as to the time we were together, but we were together at least an hour and a half—my impression is, longer. Gov. Hubbard began business by making to me, in presence of the others, a statement as to his interview with the persons named, at his office, before coming to my office. I cannot recall his precise language; but I understood at the time that it had been agreed between them that they, the beneficiaries under the trust and under the will, should give to the executors a full and final discharge, excepting as to the portion of the stock of Colt's Arms Company held by James B. Colt for life, which was excepted;
292 he also stated that it had been agreed among them that $5,500 should be allowed as compensation to the trustees. As that was the first time I had heard of this sum fixed as compensation, I inquired of the three gentlemen if it was satisfactory. The two Mr. Colts assented willingly, and Mr. DeWolf said that it had been agreed upon. I then proceeded to draw checks, make transfers of stock, and fill up and sign certificates. The receipts and discharges, in accordance with the understanding made between Governor Hubbard and the parties, were copied by some of the gentlemen from a draft made by Governor Hubbard. I don't know of any special incident that occurred. No objection was made by either of the three gentlemen named to executing these documents. As I have stated, the interview continued at least an hour and a half.

9. State whether at that time all the checks and transfers were delivered, except those referring to Edward D. Colt's, deceased, share, which, as you say, were retained until Mr. Robinson could obtain a power of attorney from Edward D. Colt's assignee.

A. According to my belief and recollection, they were.

Cross-examined by Mr. ASHLEY:

Cross-interrogatory 1. Are you administrator upon the estate of Henrietta J. Colt; and, if so, can you state about what time you were appointed?

Answer. I was administrator of that estate, but my account was settled many years ago, and my memory is very indistinct; I think I must have been administrator in 1866.

X 2. She was the daughter of Elizabeth H. Colt and Samuel Colt, testator, was she not?

A. She was.

X 3. How are you related to defendant, Mrs. Elizabeth H. Colt?

A. I am a brother of Mrs. Colt.

X 4. Please state, if you can, what children were born to the testator after the date of his will, June 6, 1856?

A. All his children were born after that date; the eldest was Samuel; I do not remember his middle name; Caldwell H. Colt is another of his children, Elizabeth and Henrietta; all are dead excepting Caldwell H., and all had died before the commencement of the James B. Colt suit; Elizabeth and Samuel died before
293 the testator, and Henrietta a few days after the testator.

R. W. H. JARVIS.

Subscribed and sworn to, at Hartford, this 27th day of November, A. D. 1880, before me.

HENRY E. BURTGN,
Commissioner of the Circuit Court of the United States for the District of Connecticut.

HENRY C. ROBINSON called by Mr. HYDE and sworn:

1. Name, age, residence, occupation.

Answer. Henry C. Robinson; age, 48; residence, Hartford, Connecticut; occupation, a lawyer.

2. State whether you have read the testimony of Mrs. Theodora G. DeWolf Colt, given in rebuttal for the complainant, at Providence, October 8, 1880, and also the testimony of Samuel P. Colt and LeBaron B. Colt, given at the same time on behalf of complainants; and, if so, whether there is anything in the testimony of either of those witnesses which you desire to explain or contradict, or which will lead you to modify, or add to your testimony heretofore given; if so, please state fully.

A. I have read the three depositions. In regard to interrogatory 5, addressed to Mrs. Colt, and its answer, I have to say that her statement, that I solicited employment as a lawyer, is utterly and emphatically untrue; that such a thing I have never done from her or anybody else; the rest of her said answer, giving her share in the conversation, is untrue. She never told me that she required no lawyer, nor that she considered that there was nothing more necessary to be done. I have no sort of recollection that she ever told me that the executors would oppose Judge Colt's suit. In regard to the testimony of S. P. Colt, in answer to interrogatory 20, that I acted for the executors in the matter of the Wales property, I wish to say that I never acted for the executors in any professional matter to my recollection. The will of Samuel Colt was proved in Massa-
294 chusetts; the Wales property was vested in the residuary devisees, as tenants in common. As I remember them, they were Mrs. Elizabeth H. Colt, Samuel C. Colt, and the children of

Christopher, excluding George. Both Gov. Hubbard and myself had correspondence with some Massachusetts manufacturer about purchasing that property, and a purchase price was finally agreed upon, which is not in my mind now. I was already counsel for all these parties, except Mrs. Elizabeth H. Colt, and in this matter I prepared the conveyances and arranged for their execution by all these owners. The executors had nothing to do with the matter officially. In regard to the statements of LeBaron B. and S. Pomeroy as to my services in the final settlement of the trustees' account in January, 1873, my recollection of the transaction is refreshed by my correspondence and books of accounts. I find by my books that on the 6th of February, 1873, I was paid by LeBaron B. Colt the sum of $100.00 for services in connection with that final account. The entry is, "February 6, L. B. Colt., &c., credit in full, $100.00." The &c. refers to his brother, sister, and mother.

I had been apprised by letters from LeBaron, which I will hereafter introduce, of this proposed settlement. I am very strongly of impression that LeBaron spent the evening of January 10th in my parlor, when we discussed the particulars of this account, and that it was not expected when we parted that I should be present at the final settlement; that on the noon or afternoon of the 11th LeBaron came into my office and said that Governor Hubbard wished me present when the account was finally closed. I have no recollection or belief that I was sent for merely to advise upon any question of fees. In regard to the statement of the several witnesses that I was not known to them as their counsel and attorney, I have to say that that is not true. During the life of Edward D. Colt the business of the family with the estate, excepting perhaps the interest of Mrs. DeWolf, was almost wholly conducted by Edward; after his death, in the fall of 1868, it was chiefly conducted by LeBaron B. Since reading these depositions, I have instructed my clerk to examine my correspondence from 1867 to 1873, inclusive, and deliver the letters to me from different members of the family. Although Edward was here most of the time until his death, I
295 hold in my hand about forty letters from Edward, LeBaron, Pomeroy, Mrs. DeWolf, and Mrs. Theodora DeWolf Colt, all upon subjects connected with this estate. A personal search of my correspondence might disclose more letters, nor do I make it a habit of preserving all my letters which I deem unimportant. I introduce the letters.

(Letters laid in and marked Exhibits 19 to 66, inclusive.)

To the letter of Edward D. Colt, marked Exhibit 19, I replied, giving my views of the ownership of the remainder interest in Judge Colt's stock. In arriving at a conclusion, I had the great benefit of Governor Hubbard's best thoughts in the matter.

Before the letter of LeBaron, of September 23, 1868, I had endeavored to explain to him their whole interests in this property, including the remainder in Judge Colt's stock.

In October, 1868, LeBaron had taken out letters of administration upon Edward's estate.

In compliance with the letter of Mrs. DeWolf, September 3d, 1869, I had several interviews with Governor Hubbard to find out if the executors would consent to a change in the trusteeship as she desired. These interviews were after Mr. Hubbard's return from Washington.

The entire management of settlement of Edward's estate, or almost the entire management, LeBaron left to me.

His, Edward's, interest in Samuel Colt's estate, being quite uncertain, was inventoried, as I recollect it, at a nominal sum under my advice—LeBaron advanced the money to pay Edward's local debts, something over $3,000—Edward's interest in the trust fund, and in his stock, and possibly in the estate generally, was incumbered in Mrs. DeWolf's farm to a large amount, something over ($30,000) thirty thousand dollars. It was also incumbered in LeBaron's farm to a large amount, say fifteen thousand dollars or more.

I advised LeBaron that, as the creditors were out of the way, nobody had any further interest in Edward's interest in Samuel Colt's estate, excepting the incumbrances by assignment, his father's family and Edward's widow.

After many interviews with Mr. Charles H. Brainard, who was Edward's widow's father, we learned that the widow proposed to abandon every interest in the estate. I, therefore, had an
296 order passed, allowing the administrator to sell Edward's interest in Samuel Colt's estate at private sale. The sale was made at my suggestion, in form, to Mrs. Christopher Colt; it was, in fact, a sale to LeBaron, as he informed me.

Some time Judge Colt did attempt to move in court with a hostile suit, seeking an injunction, which, as I remember it, was both prohibitory of some things which I don't remember, and mandatory of a large disposition of surplus earnings. I was in court when it was presented. The court declined to sign it. I think this affair gave rise to the rumors which LeBaron's letter of June 25th speaks of.

In explanation of Mrs. Colt's letter of January 29th, 1873, the interest of Edward's estate was considerably involved, but was really distributed by an arrangement between LeBaron and the DeWolf's—Mr. DeWolf, I think.

In acting as Mrs. Colt's attorney, I had to endorse checks given by Mr. Jarvis in proportions to fit this arrangement between LeBaron and Mr. DeWolf, and there were also stock transactions in armory stock which do not lie clearly in my mind. I could recall them by the aid of the transfer book, I think. I made a detailed report to Mrs. Colt of just what I did under her power of attorney.

(Objection. Complainants' counsel objects collectively and in detail to the statements contained in the foregoing answer, as not

being in rebuttal to any of the rebuttal testimony heretofore given on the part of the complainants, and also for irrelevancy and incompetency.

And also objects for the same reasons to the introduction in evidence of each of the letters produced by the witness.)

Ques. 3. You testified in your examination-in-chief, that the amount coming to LeBaron B. Colt and S. Pomeroy Colt, in January, 1867, was $34,864.84; that this was paid to you as attorney for Mrs. T. W. Colt, their guardian; that on the same day you gave to her your check, which you produced, for $32,364.84, reserving $2,500 on account; Mr. Jarvis has testified he paid this money by two checks, dated each January 16th, 1867, each payable to T. D. W. Colt, and each for the sum of $17,432.42, one to her as guardian for L. B. Colt, and the other to her as guardian for S. P. Colt; Mrs. T. W. Colt testifies, in answer to interrogatory 10 in her rebuttal testimony, that she never saw the check for
297 $32,364.84 which you gave to her, but that she knew such a sum of money was paid to her agent, George D. Colt, and that any fees you may have taken from the sum collected could not have been for services in the James B. Colt suit, or anything connected therewith; please state, if you can now recall, how these two checks for $17,432.42 each came into your hands, who delivered them to you, and who endorsed them.

(Objected to as incompetent.)

Ans. 3. It has lain in my mind ever since I have endeavored to recall these transactions that Mrs. Christopher Colt was personally in my office that day, and that I delivered my check to her.

The development of these depositions tends to confirm that impression; Mr. Jarvis's checks were undoubtedly delivered to me by Governor Hubbard. If payable to Mrs. Colt's order, as the stubs show, they must have been endorsed by her. My own check was hunted up for me, just before I made deposition, and the endorsement by George D. Colt, attorney, was a surprise to me.

I have no present memory of ever having known that George was his mother's attorney, for any purpose, or of having myself been brought in contact with him in that capacity. I cannot, however, swear absolutely to Mrs. Colt's presence at that time, but it is, and has been, my impression, that it was so, and that before I had any idea that she would dispute it.

HENRY C. ROBINSON.

Subscribed and sworn to, at Hartford, this 27th day of November, A. D. 1880, before me,

HENRY E. BURTON,
Commissioner of the Circuit Court of the United States for the District of Connecticut.

298 [*Exhibit* 17. *H. E. B., U. S. Com'r.*]

No. HARTFORD, CONN., *Jan.* 10*th*, 1873.

HARTFORD TRUST COMPANY.

Pay to the order of Henry C. Robinson, attorney, thirty-one thousand seven hundred fifty-nine one one-hundredths dollars.

$31,759.01. R. W. H. JARVIS, *Trustee.*

Endorsed: Pay to the order of F. E. DeWolf. Henry C. Robinson, attorney. F. E. DeWolf.

[*Exhibit* 18. *H. E. B., U. S. Com'r.*]

No. HARTFORD, CONN., *Jan.* 10*th*, 1873.

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Pay to the order of H. C. Robinson, attorney, seven hundred and forty-three and eighty-one one-hundredths dollars.

$743.81. R. W. H. JARVIS, *Executor.*

Endorsed: Pay to the order of LeBaron B. Colt. Henry C. Robinson, attorney. LeBaron B. Colt.

[*Exhibit* 19. *H. E. B., U. S. Com'r.*]

EDW'D D. COLT,
Gold and Stock Broker, No. 2 Union Hall Building.

BRISTOL, 29*th July*, 1867.

HENRY C. ROBINSON, ESQ., *Hartford.*

FRIEND HENRY: We have been having a little argument here between us in regard to the disposition of the homestead and armory stock of Mrs. Samuel Colt, in event of her decease. Will you have the kindness to give your opinion on the subject; also what becomes of the 570 odd shares left James B. Colt, *or rather what the court allowed him?* You will notice in the original will that
299 Mrs. Colt had the use of stock and homestead during her life and it then went to her children; in the codicil, however, nothing is said about the children.

Very truly yours, EDW'D D. COLT.

[*Exhibit* 20. *H. E. B., U. S. Com'r.*]

TUESDAY, 7*th April*, 1868.

MY DEAR HENRY: The matter I spoke about last Friday please push ahead as fast as convenient. I am about dead doing nothing.

I see no reason, as you say, why the executors cannot advance some $10,000 or $12,000, and hold my 125 shares stock as collateral, or else give it to me out of dividends already declared. These, with the accumulations, must now amount to over $30,000.

I am anxious to get into some kind of business as soon as I can. This "loafing around" would soon kill me.

being in rebuttal to any of the rebuttal testimony heretofore given on the part of the complainants, and also for irrelevancy and incompetency.

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HENRY C. ROBINSON.

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MY DEAR HENRY: The matter I spoke about last Friday please push ahead as fast as convenient. I am about dead doing nothing.

I see no reason, as you say, why the executors cannot advance some $10,000 or $12,000, and hold my 125 shares stock as collateral, or else give it to me out of dividends already declared. These, with the accumulations, must now amount to over $30,000.

I am anxious to get into some kind of business as soon as I can. This "loafing around" would soon kill me.

Election didn't go quite right; better luck next time.
Trusting this will find you well, believe me
Truly your friend, EDW'D D. COLT.
HENRY C. ROBINSON, Esq., *Marble Block.*

[*Exhibit* 21. *H. E. B., U. S. Com'r.*]

BRISTOL, 20*th April* 1868.

MY DEAR HENRY: I find on going to the town clerk's office that the document I gave Mrs. DeWolf never has been recorded as I at first supposed, and as I told you the other day.

I wrote you a hurried note this morning, which I presume you have received ere this.

I leave for New York to night, and probably shall be in Hartford Wednesday or Thursday.

Yours, etc., E. D. C.

300 [*Exhibit* 22. *H. E. B., U. S. Com'r.*]

BRISTOL, 20 *April*, 1868.

MY DEAR HENRY: If I can get Mr. and Mrs. DeWolf to sign the document, of which I send you a copy, do you think it the best thing to be done, and do you think the executors will make the purchase I wish on the strength of the 125 shares of armory stocks, or would you advise me to try and have Mr. DeWolf relinquish all claim to the accumulation to date, and simply pledge him the stock?

The mail closes in five minutes.

Please write or telegraph me at the Fifth Avenue Hotel what to do.

I leave for New York to-night, and shall probably be there until Wednesday afternoon.

Very truly yours, EDW'D D. COLT.

You will see Mr. Turner signed what you wrote on the first document.

[*Exhibit* 23. *H. E. B., U. S. Com'r.*]

BRISTOL, R. ISLAND, 18 *May*, 1868.

H. C. ROBINSON, Esq., *Hartford.*

FRIEND HENRY: DeWolf has finally executed and delivered to me a document similar to the one I showed you in Hartford the other day. I have sent it on for record, and shall then serve copies on each executor and on the treasurer of the company. Now the question is, how am I to get any money? Can Pomeroy, with mother's consent as guardian, borrow, say $12,500 to $15,000, and take a second mortgage on all my interest, past and future, in the trust fund? The investment would be a good one, as I would allow him a larger rate of interest than he would have to pay.

I wish you would drop me a line, on receipt of this, letting me know your opinion; should any other way suggest itself to you, I

should be pleased to know it; I do want to get my debts paid off, and on to a farm as soon as possible.

If you are through with those documents, please send them when you write.

301 Hoping to hear from you at your earliest convenience, believe me,

Very truly yours, EDW'D D. COLT.

[*Exhibit* 24. *H. E. B., U. S. Com'r.*]

PATERSON, N. J., 23*d September*, A. D. 1868.

HENRY C. ROBINSON, Esq., *Hartford, Conn.*

FRIEND HENRY: I have just written Col. Bissell asking him to negotiate a loan on my armory stock of from $6,000 to $10,000, if he could do so, and referred him to you for any information. Should he call, will you be kind enough to show him how my interest stands under the will.

In borrowing the money I think I could pay for its use as it became due; if not, the matter could be arranged as in my sister's "Agreement." "Any deferred annual or semi-annual payments of interest to be on interest." At one time I gave Barrie a mortgage of $15,000 on my stock, but this claim he has since waived.

Very truly yours, EDW'D D. COLT,
Paterson, New Jersey.

Care Hon. A. B. Woodruff.

[*Exhibit* 25. *H. E. B., U. S. Com'r.*]

BRISTOL, *Sep.* 23*d*, 1868.

H. C. ROBINSON.

DEAR SIR: I spoke to you the other day about the drawing some papers between Ed. and myself, in case I decided to give up the second claim on Ed.'s part of the "Trust Fund" for one covering everything he might inherit under the will. I enclose you some papers which I had drawn up over two months ago, as security for some money lent Ed. over a year ago. These papers he did not wish to sign, and I compromised with him, by his giving me a bill of sale of the remainder of the "Trust Fund," after my sister's claim; but now he wants me to give this up, or allow a prior
302 claim upon it to the amount of $8,000, and then for me take an absolute title for everything else he may have out of the estate, binding myself, of course, at the same time only to take the amount of my debt. You mentioned that the papers would have to be drawn with care, and so I enclose these to know if they will answer; if, in your judgment, they do not, please draw the right kind. I think Ed. better give me a bill of sale of some kind, and then I give him an agreement. Write me at Bristol, R. I., if these papers will do, or if you will, draw others. In haste, believe me,

Very truly yours, L. B. COLT.

[*Exhibit* 26. *H. E. B., U. S. Com'r.*]

NEW YORK, 28 UNION SQUARE, *Jan.* 24*th*, 1869.

H. C. ROBINSON, Esq.

MY DEAR SIR: I wrote Mr. Jarvis about the amount that you said was reserved by the executors, viz.: $150,000, to see if Ed.'s proportion could not be paid over. He said that only $60,000 was so reserved, and that a consideruble proportion of that would eventually have to be paid for debts of the estate. He said, however, he would consult with Mr. Hubbard when he came to Hartford. Do you think of any way by which enough money could be realized from the estate to pay his (Ed.'s) debts, which amount to four or five thousand?

Very truly yours, LEBARON B. COLT.

[*Exhibit* 27. *H. E. B., U. S. Com'r.*]

BRISTOL, *Aug.* 2*d*, 1869.

MR. H. C. ROBINSON, *Hartford, Conn.*

DEAR SIR: Will you have the kindness to inform me if you do not think that if I petition to the court of probate to have the dividends on my proportion of the 800 shares of the Fire-arms stock, held in trust for us until my brother Pomeroy becomes of age, paid to me as they are declared, that they will grant it?

303 I require it for educational purposes, and if you will read that portion of the will relating to the trust, you will see that it is left for that particular purpose, viz.: "The profits and dividends thereof to be applied to the *education* of his said issue."

I cannot see myself why I should not have the dividends for my education in the languages, etc., when it was left to me by my uncle for that very purpose, and I am quite sure that the court in probate in Bristol, where I now claim residence, would grant this same petition. I wish to keep this very quiet for the present, and it is *useless* to say anything to the trustees, as they do not feel authorized to pay over the dividends unless so ordered by the court.

Please answer as soon as possible, saying when the petition could be made, and oblige.

Yours very truly, ISABELLA C. DEWOLF.

Care S. P. Colt, Bristol, Rhode Island.

[*Exhibit* 28. *H. E. B., U. S. Com'r.*]

NEW YORK, 28 UNION SQUARE, *March* 15*th*, 1869.

H. C. ROBINSON, Esq., *Hartford, Conn.*

MY DEAR SIR: I wrote you some time ago, saying that in answer to an inquiry of mine, Mr. Jarvis has written that the amount reserved by the executors at the settlement of the estate was $60,000, instead of $150,000, as you supposed, and that consequently Ed.'s share would be a small amount, especially if the Texan claim had to be paid out of the $60,000. Do you think of any way we can

manage to get a small sum from the estate, so as to settle up his small private bills, which perhaps amount to $1,000?

Mr. Jarvis wrote me he would consult with Mr. Hubbard on his return to Hartford, and if they could, he would make a division of the reserved funds to the legatees.

I receive occasional letters from parties and would like to be able to give them some definite answer. It seems to me there will eventually, in the trust fund, be more than sufficient to pay all claims, if the present rate of increase continues. Be kind
304 enough to write me what course you think advisable, and also if it is necessary for me to come to Hartford to answer as administrator within the first six months, which end the first part of April.

Very truly yours, LEBARON B. COLT,
28 *Union Square, N. Y.*

[*Exhibit* 29. *H. E. B., U. S. Com'r.*]

BRISTOL, *Sept. 30th*, 1869.

H. C. ROBINSON, ESQ., *Hartford, Conn.*

DEAR SIR: Your favor of the 9th inst. was received this morning and read with interest. The matter in question has been in my mind for some time. I have always had two objects in view, increase of income and a more lucrative investment of the accumulations, which at present pay at the most 4 per cent., and perhaps only 3½. You write me if the trustees were to consent of course the thing could be brought about. It is to be hoped that they will consent, and when you have an interview with Mr. Hubbard please endeavor to ascertain if he would object, as I imagine that Mrs. Colt and Mr. Jarvis would follow Mr. Hubbard's advice.

In answer to your question, if the trustees make me any allowance, I have to answer that they have never made me any allowance whatever, and I quite agree with you, that a liberal construction of my uncle's will is the proper one.

In the event of a contest, I have no doubt that my brothers would join me, but at present they do not know that I have consulted you, or that I have any idea of making a change. I hope to know very soon the result of your interview with Mr. Hubbard; then we can tell better what is best to do. Mr. Hubbard has always shown a disposition to comply with our requests, and I hope that he may not feel obliged to oppose this.

Yours very truly, I. C. DEWOLF.

P. S.—Will you have the kindness to ask a broker in Hartford, what the Hartford and New York Steamboat stock is selling at.

305 [*Exhibit* 30. *H. E. B., U. S. Com'r.*]

BRISTOL, *September* 3, 1869.

H. C. ROBINSON, ESQ., *Hartford, Conn.*

DEAR SIR: Your favor was duly received, and contents noticed.

Please accept thanks for your prompt reply. While looking over the statutes of Connecticut I found one that I should judge would enable me to have my portion of the 500 shares and accumulations transferred to a trustee in this State where I now reside. Will you have the kindness to read it, and give me your opinion, also as to the best way to proceed in the matter.

I do not imagine that the trustees will have any objections to the transfer, and undoubtedly it would be best to see them first and ascertain how they feel.

The statute I refer to is in Revision of 1866, page 409, section 32 and 33. I hope to hear from you soon.

Yours, very truly, I. C. DEWOLF.

[*Exhibit* 31. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *September* 28, 1869.

H. C. ROBINSON, Esq., *Hartford.*

DEAR SIR: Your last favor, of the 9th inst., was duly received and answered without delay; since that time I have not heard from you, but suppose Mr. Hubbard has not yet returned.

When the estate was settled I had apportioned to me fifty shares of Union Ferry stock—the ferry crossing the Connecticut river from the dyke. I am entirely ignorant as to the company stands, how much capital it has, under what sort of a charter it is carried on, etc., etc., and, for aught I know, I may be liable to assessment. Will you have the kindness to ascertain through Mr. Hubbard about this matter, and if possible I should like a copy of the charter; at the same time I would thank you to inform me if the armory has a charter as a joint stock corporation, or if it is operated under the laws of Connecticut; by so doing you will oblige,

Yours, truly, I. C. DEWOLF.

306 [*Exhibit* 32. *H. E. B., U. S. Com'r.*]

BRISTOL, *October* 8, 1869.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: Your favor of the 5th inst. reached me yesterday, answering various questions I made in my former letters. I note what Mr. Hubbard says about the trust fund, and I beg you to have another interview with him, and ascertain if he will give up the trust to another trustee residing in a State (other than Connecticut) where the beneficiaries claim resident, provided all concerned wish the change. My mother is desirous that the change should be made, and it only remains to ask my brother Barry, who is now in the West, but is expected home next week.

Of course I suppose Mr. Hubbard knows of the statute that I referred you to in my former letter; if he should not, you will please call his attention to it, and I might suggest that perhaps it would be well to refer to the state of feeling existing between the other trustees and my family, before you ask him if he will give up the trus-

teeship; no doubt he will see that a change would be pleasant to all concerned. At the time of settlement of the estate, my mother made a request that Mr. Hubbard should be sole trustee, and he answered that it would be impossible, but if she had known that the trusteeship could be transferred to this State, she would have wished it done at that time.

I hope Mr. Hubbard will not think we are dissatisfied with his monagement of the fund, or that we entertain any unkind feelings towards him.

Please have the kindness to write me the result of the interview at once, as I am anxious to know what Mr. Hubbard says. I hope to receive soon the statement of which you speak. I have always understood that the funds were invested in Connecticut 6 per cent. bonds, and after deducting town, State, and General Government taxes, trustee charges, &c., the net income must be very small, the town taxes alone being 1 per cent.

Yours, very truly, I. C. DEWOLF.

307 [*Exhibit* 33. *H. E. B., U. S. Com'r.*]

UNION PLACE HOTEL, NEW YORK, *October* 18, 1869.

HENRY ROBINSON, Esq.:

MY DEAR SIR: On looking [—] the letter of administration of Ed.'s estate I find an inventory should have been rendered on or before the 13th of October, 1869. His debts, as far as I can ascertain, amount to about $5,500 outside of the family. I spoke to Mr. Hubbard in August about a division of the surplus now held by the executors. He said he expected every day to hear from Mr. Eaton, accepting the proposed settlement of the Texan claim, and that then the division would take place at one. Of course no kind of a settlement of Ed.'s estate can be made until this fund is reached. Will you ascertain from Mr. Hubbard when I can obtain any money from him? Is it necessary for me to come to Hartford, or in any way under the circumstances to render an inventory immediately to the court of probate?

I called to consult with you in August, but you were out of town, and I should have been in Hartford again, had I not been occupied traveling west for six weeks.

What is your opinion of changing the trustees of the trust fund, as Mr. DeWolf seems to wish? I hardly think it best, though I have not given him a decision yet. Write me at Union Palace Hotel, and believe me,

Very truly yours, LEBARON B. COLT.

[*Exhibit* 34. *H. E. B., U. S. Com'r.*]

NEW YORK, 5TH AVENUE HOTEL, *December 16th*, 1869.

H. C. ROBINSON, Esq.:

DEAR SIR: Yours of November 9th was duly received, and being

rather unsettled of late have not replied. I was interested in the statement you gave me of the trust fund, but do not quite understand it. Are the accumulations $127,000? You tell me that the present investments are 57 U. S. stock and 17 State bonds—say, $74,000. Do you know where the residue is invested, and
308 *the date* of purchase of the U. S. stock, as a short time ago the whole fund was in Connecticut bonds, and I would like to know when that change was made? Please address 5th Avenue Hotel, room 107, and oblige,

Yours, very truly, I. C. DEWOLF.

[*Exhibit* 35. *H. E. B., U. S. Com'r.*]

NEW YORK, 5TH AVENUE HOTEL, *January* 12, 1870.

H. C. ROBINSON, Esq., *Hartford, Ct.*

DEAR SIR: Your favor of the 10th inst. is at hand, and contents noticed. Since writing to you I have obtained the desired information, therefore for the present you need give yourself no further trouble.

Yours, very truly, I. C. DEWOLF.

[*Exhibit* 36. *H. E. B., U. S. Com'r.*]

BERLIN, *Janury* 13*th*, 1870.

H. C. ROBINSON, Esq.

MY DEAR SIR: While I am away, I desire you to keep a general lookout over my interests in Hartford. Though I have no immediate apprehension, yet our family are so little in harmony, that I shall feel more at ease if I know some one is keeping an eye on what transpires. You will be kind enough to procure a statement of the trust fund down to Jan. 1st, 1871, and forward it, and also will write me from time to time as it may be advisable. After having satisfied a curiosity natural to any one visiting Europe for the first time, by traveling over the more interesting portions of Great Britain and the continent, I have, since the beginning of the year, quitely settled myself here in Berlin, in a German family, with the object of course of acquiring the language. The study is drudgery at first and progress slow, but I hope in time to derive much pleasure from it.

Sincerely yours, LEBARON B. COLT.

Address care of Bowles Brothers, 449 Strand, Charing Cross, London.

309 [*Exhibit* 37. *H. E. B., U. S. Com'r.*]

NEW YORK, 51 W. 25TH STREET, *March* 18*th*, 1870.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: On leaving you Saturday, I called on Mr. Hubbard. Mr. Brainard and Alice were in consultation with him concerning the amount of the "trust fund," etc., I suppose, at the time I called.

I did not tell Mr. Brainard very specifically concerning the two claims of my sister and myself against the trust fund, nor what they amounted to at present with interest. I wish you would see Mr. Brainard, and state to him exactly how the matter stands, and show him the figures. The two claims of my sister and myself will amount on the first of June next to the gross sum of $52,980.90, her claim being $30,000, and drawing compound interest from August 1st, 1867, and mine being $15,000, and drawing simple interest from the 15th of July, 1867. The gross sum before named, together with the debts included in the administration account, equal to about $5,732.16, makes the total estimate of indebtedness $58,812.06 on the first of June, 1870.

To balance this there is the interest under the will. The accumulations of the "trust fund" now amount to about $130,000, one-quarter of which equals $32,500, in addition to which there is 125 shares of stock and a small dividend that will soon be handed over, comprising the eighteenth part of a surplus now held by the executors. This, for the present, comprises all the interest that can be reckoned on as *certain*.

I wish Mr. Brainard to know exactly how the estate stands and then judge for himself. The figures show everything to rest on a contingency. I should be glad if in your interview you could induce Mr. B. not to bid much over the indebtedness, and to wholly abandon the plan of a public sale, but whatever may be his final determination, I wish you to retain the estate in our family. Be kind enough to let me know any new facts you may learn.

With kind regards, believe me, respectfully yours,

LEB. B. COLT.

I would suggest, subject to your approval, that if Mr. Brainard insists on buying the estate, that the two family claims of
310 $45,000 and interest be passed upon by the commissioners, so that he may have to pay immediately the whole amount of the debts, which is near ($60,000) sixty thousand dollars.

LEB. B. C.

[*Exhibit* 38. *H. E. B., U. S. Com'r.*]

NEW YORK, 51 W. 25TH, *April 8th*, 1870.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: Your letter of April 5th was duly received. It is not necessary to have the two claims of $30,000 and $15,000 presented, for my sister has said nothing regarding the matter, and as far as my own debt is concerned, I do not desire it; therefore, for the reasons you suggest, they had better not be put in the accounting. I will be up to Hartford next week—Friday, April 15th—and wish you would then have things in readiness for the final proceedings. If any more delay is necessary beyond Friday, be kind enough to inform me, that I may postpone my coming.

Very truly yours, LEB. B. COLT.

[*Exhibit* 39. *H. E. B., U. S. Com'r.*]

NEW YORK, 51 W. 25TH STREET, *April 11th*, 1870.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: It will be more convenient for me to come to Hartford on Thursday of this week, instead of Friday. I will therefore see you Thursday noon. If this time is not agreeable to you, or for any reason it is necessary to postpone the time, be kind enough to inform me by mail.

Very truly yours, LEB. B. COLT.

311 [*Exhibit* 40. *H. E. B., U. S. Com'r.*]

NEW YORK, 51 WEST 25TH STREET, *May 14th*, 1870.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: I have heard nothing from Mr. Brainard nor yourself of an offer on his (Mr. B.'s) part to purchase Ed.'s estate. Write me if you have ascertained anything, and also what day next week, with the exception of Wednesday, you will be in readiness to assist me in the final settlement of the estate.

Truly yours, LEB. B. COLT.

Mr. B.'s time to make an offer expired, I believe, last Saturday, (May 7th.)

LEB. B. C.

[*Exhibit* 41. *H. E. B., U. S. Com'r.*]

NEW YORK, 51 W. 25TH, *May 20th*, 1870.

H. C. ROBINSON, Esq., *Hartford, Conn.*

MY DEAR SIR: Enclosed you will find check for three thousand two hundred and seventeen dollars and thirty-three cents ($3,217.33), the amount of Hartford bills. On the list you gave me the bill of $25 to William Toby was omitted. When you get all the receipts you may send them to my address at Bristol, R. I., where I will be after next week. If your work is more than your pay in connection with this estate let me know and I will be happy to further remunerate you.

Truly yours, LEB. B. COLT.

[*Exhibit* 42. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *Aug. 8th*, 1870.

MY DEAR SIR: Your favor of the 6th instant was received this morning. I would say in reply that my brother LeBaron told me before going to Europe that you were to receive the amount
312 coming to him from the Colt estate and forward it to me. I have charge of his business affairs during his absence.

Very truly yours, SAM'L P. COLT.

HENRY C. ROBINSON, Esq., *Hartford, Conn.*

We would be very happy to see you in Bristol this summer, if you come this way. S. P. C.

[*Exhibit* 43. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *Aug. 15th*, 1870.

HENRY C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: Your favor of the 6th instant was duly received. I replied the next day, and not having heard since, thought my letter might have miscarried. LeBaron told me that you were to receive the amount coming to him from Col. Colt's estate and forward it to me. I have charge of his business affairs during his absence.

Our family are all well with the exception of my sister, Mrs. De Wolf's child, who died in Newport on the 11th.

Very truly yours, SAM'L P. COLT.

[*Exhibit* 44. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *Aug. 19th*, 1870.

HENRY C. ROBINSON, Esq.

DEAR SIR: Your favor of the 17th inst. received yesterday morning; last evening's mail brought me yours of Aug. 10th, with New York check for $3,594.61 enclosed. The letter was missent and had the post-mark of New Haven on it. I enclose receipt for the check.

Hoping to have the pleasure of seeing you here this summer, I remain,

Very truly yours, SAM'L P. COLT.

313 [*Exhibit* 45. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *June* 13, 1870.

H. C. ROBINSON, Esq.

MY DEAR SIR: Your letter containing receipts has been received. The discrepancy, the amount sent, and that paid out by you, arises as follows: In the paper given me by yourself, the charges of the appraisers is ten dollars, while the receipt acknowledges but five; there is also a bill of twenty-five dollars to William Toohy, auctioneer, on Main street; there is also a mistake of a few cents in Rathbun's bill, as given in our estimate and as receipted. When it is convenient, you might inquire of Toohy if such a bill exists, and if found correct, pay him. I believe everything else is all right.

Very truly yours, LEB. B. COLT.

[*Exhibit* 46. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *February* 17, 1872.

HENRY ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: I have a lot on Park street, Hartford, for which I have had an application to lease for a term of years. Will you have the

kindness to let me know if my guardian has authority to give a lease of my real estate without permission from the probate court, and oblige,

Very truly yours, SAM'L P. COLT.

[*Exhibit* 47. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *March* 16*th*, 1872.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR MR. ROBINSON: Your favor and accompanying lease were duly received.

I have had the lease executed and acknowledged as you directed. Yearly payments are as satisfactory to me. If Steele holds the lease, I should like to know the date of it, that I may know
314 when to expect the rent. I told him to take possession before writing you, but do not know as he did so.

We are residents of Bristol, R. I., and not Boston, but I suppose that will make no difference.

I return the lease and inclose $10.

Very truly yours, SAM'L P. COLT.

[*Exhibit* 48. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *May* 6, 1872.

HENRY C. ROBINSON, Esq., *Hartford. Conn.*

DEAR MR. R.: I write to ask you if Mr. Steele signed the lease I sent on, and also would like to know the date of the same, if the papers have been given to him.

Very truly yours, SAM'L P. COLT.

[*Exhibit* 49. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *February* 24, 1872.

DEAR MR. ROBINSON: Your favor was duly received. Mr. Steele has decided to accept a lease, such as you mention may be given—viz., one executed by my guardian and self, and made good by me next January, when I will be of age. I write, therefore, that you would have such a one drawn of my Park street lot. The lot is situated on Park street, Hartford, at the junction of the street and railroad track. It contains about three and a half acres, and was given to me in the distribution of my uncle's personal estate; said lease to be in favor of F. C. Steele, of Hartford, to expire in ten years from this date; the annual rent, $150; at the expiration of the lease I to have the benefit of such improvements as grading and fencing.

Please send the paper here to be signed, and let me know
315 your charges. Mother desires her kind regards to yourself and family. I hope if you come to the city you will call and see us.

Very truly yours, SAM'L P. COLT.

[*Exhibit* 50. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *June* 25, 1872.

H. C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: There is a rumor afloat that Judge Colt will attempt another suit, of what character I know not, against the estate. Will you please keep watch a little and let me know at once if anything relative to such an end transpires. In his present condition I am not apprehensive he will attempt trouble, but as we are all absent from Hartford I think it prudent to have some one to have an eye upon our family interests. I am on East for a short trip. My address will be Bristol for the next three weeks, after that, No. 31 25th street, Chicago. With best regards, believe me,

Truly yours, LEB. B. COLT.

[*Exhibit* 51. *H. E. B., U. S. Com'r.*]

31 25TH STREET, CHICAGO, *Nov.* 25*th*, 1872.

Hon. H. C. ROBINSON.

MY DEAR SIR: So far as you have means of information, will you ascertain for me what you can about the Fire-arms stock? Its paper value is probably about the same as it was six years ago, but I want also to get at a fair estimate of what its actual value might be deemed to be, as based upon its present business and immediate future prospects. My sister's lien on Ed.'s estate will involve in its settlement the sale of his stock contained in the trust fund, and as I am the next creditor, and that to a large amount, it is important to my interests to know what the stock is really worth, that I may decide whether it is best to pay her the comparatively small portion of her lien that will rest for payment upon the stock (the
316 accumulations on the fund probably being able to satisfy it within seven thousand dollars), and so take the stock, or to permit the stock to be sold at once to Mrs. Colt probably, and satisfy my claims, so far as I am able, from what is left of the proceeds. If I have made no error in my estimates of trust fund, I might say I had decided already to satisfy my sister's claim and take the stock, as being by far the better course; still I am naturally anxious before fully making up my mind to obtain some knowledge of the armory's position. I would like to confer with you on this and other points between now and Pom.'s majority, January 10th, 1873. I shall be in Hartford about that date. Mr. Jarvis writes that the armory is doing a little better—they passed the dividend this fall. Has Mr. Hubbard returned from Europe?

Truly yours, LEBARON B. COLT.

[*Exhibit* 51½. *H. E. B., U. S. Com'r.*]

31 25TH STREET, CHICAGO, *December* 27*th*, 1871.

Hon. H. C. ROBINSON.

MY DEAR SIR: I have just received a note from Mr. Hubbard,

informing me that J. B. Colt had notified him not to pay over the trust fund, as he was about to commence suit on the ground of "undue influence, fraud or mistake," in the interest of his children. The Judge is more than half crazy, and it would seem as if the only possible effect of the whole move would be to cause delay in the payment of the fund. But my interests are so circumstanced that any delay will ruin my credit. My brother Pomeroy and my brother Ed.'s estate are very largely indebted to me, and I have calculated upon a settlement at this time, and any temporary postponement will involve me in serious trouble. Mr. Hubbard wrote me a very kind letter. Will you use your influence to prevent any deferment on the part of the executors? Write or telegraph me if my presence is necessary or I can forward matters any by an immediate presence in Hartford. It is my intention now to be in Hartford the 7th or 8th of January. Let me know what your opinion is of the Judge's "suit." In haste.

Truly yours, LEBARON B. COLT.

317 [*Exhibit* 52. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *January* 29, 1873.

Mr. ROBINSON.

DEAR SIR: Yours was duly received. In reply will say that I fully approve of your late proceedings under my power of attorney given you by my son, LeBaron, when in Hartford last.

Yours, very truly, THEODORA D. W. COLT.

[*Exhibit* 53. *H. E. B., U. S. Com'r.*]

L. B. B. COLT, ATTORNEY-AT-LAW,
No. 94 Washington Street, Rooms 16 and 17,
CHICAGO, *February* 1*st*, 1873.

Hon. H. C. ROBINSON.

DEAR SIR: I acknowledge receipt of your favor of January 25th, enclosing certificate in my name for 125 shares of Colt's P. F. A. Man'f'g Co. As you indicate in your letter, I hereby enclose you check No. 8, for $100, on the Farmers' L. and T. Co., N. Y., which please let me know if you receive.

Very truly yours, LEBARON B. COLT.

You will observe I have opened an office. Any business you might accidentally have so far away, or possess the power of directing in these parts, which you should deem me competent to execute, I should be very glad to do. L. B. C.

[*Exhibit* 54. *H. E. B., U. S. Com'r.*]

17 BEACON STREET, BOSTON, *February* 19*th*, 1873.

HENRY C. ROBINSON, Esq., *Hartford, Conn.*

DEAR SIR: Your favor of yesterday, enclosing certificates for 50

and 165 shares of Colt's armory stock, is at hand. All is correct. Will you let me know what to send you for your trouble?

Very truly yours, SAM'L P. COLT.

318 [*Exhibit* 55. *H. E. B., U. S. Com'r.*]

L. B. B. COLT, ATTORNEY-AT-LAW,
No. 94 Washington Street, Rooms 16 and 17.
CHICAGO, *March 28th*, 1873.

Hon. H. C. ROBINSON, *Hartford, Conn.*

DEAR SIR: Your favor of the 25th inst. is received. If you cannot obtain the $20,000 loan for two years, which I very much prefer, will you see if you can negotiate one for $10,000 for thirteen months, or year from May next; if not, one for $5,000 for thirteen months. How about the Hartford Trust Company? They took the trust fund as collateral once. You will, of course, put up no more stock than may be deemed reasonable security. Let me hear from you soon again.

With regards, truly yours, LEBARON B. COLT.

[*Exhibit* 56. *H. E. B., U. S. Com'r.*]

L. B. B. COLT, ATTORNEY-AT-LAW,
No. 94 Washington Street, Rooms 16 and 17,
CHICAGO, *March* 21, 1873.

Hon. H. C. ROBINSON, *Hartford, Conn.*

DEAR SIR: I wish you to negotiate a loan for me, upon the armory stock as security, with Hartford Trust Company, or elsewhere. I hereby enclose you certificates for 300 shares of armory stock, and full power of attorney to transact necessary business. I would like a loan of twenty thousand ($20,000) for two years upon the best terms you can make, putting up as small an amount of armory stock as is satisfactory to the parties. If you cannot obtain so large an amount, then make a smaller loan, if not for so long a time, then for so long as parties are willing. I have been putting considerable money into Chicago real estate, and have a purchase-money payment of about ten thousand ($10,000) to make the
319 first of May, so it will be necessary for me to have that amount anyway. I desire, however, if it is possible, to obtain $20,000. I own real estate in the city to-day worth more than that sum, and I intend it to remain in my hands long after any note I may now make may become due. Let me hear from you at your earliest convenience.

Very truly yours, LEBARON B. COLT.

You will please return whatever certificates of stock you do not use. In case you wish any changes in the denominations, the armory will do it.

[*Exhibit* 57. *H. E. B., U. S. Com'r.*]

BRISTOL, R. I., *June* 9, 1873.

H. C. ROBINSON, Esq.

DEAR MR. R.: Your favor of the 7th inst. is at hand. I suppose that the mortgage and note can be *sent*, when ready, to Barry, at Chicago, to be executed by him as my attorney. Possibly the lenders would wish his (Barry's) power of attorney recorded on the records at Hartford. If you think that the transaction could be more readily accomplished by my giving you special power of attorney for the purposes, I will execute any papers you may send, care White, DeFristas & Rathbone, 17 Broad street, New York, provided that they get there by Thursday.

There is an insurance of $20,000 on the property. I send you one policy for $10,000, another for the same amount they have at the armory. Mr. Harbinson can tell you about it. I suppose the mortgagee will wish these policies transferred to him.

I have written you frequently, as my time here is short, and I wish to take every step necessary for procuring this mortgage before sailing.

Please address me till next Wednesday, care White, &c., New York, and after that communicate with my brother Barry on the subject, and when the money is procured, send it to him. His address is as follows: L. B. B. Colt, 94 Washington street, Chicago, Ill.

Very truly yours, SAM'L P. COLT.

320 [*Exhibit* 58. *H. E. B., U. S. Com'r.*]

FIFTH AVENUE HOTEL, N. Y., *June* 12*th*, 1873.

H. C. ROBINSON, Esq.

DEAR MR. R.: I have executed the power of attorney you sent, and think best to return the same to you, as I have already sent Barry a general power, and this will at least save the trouble of his sending power of attorney with the papers he signs for me to Hartford. I trust that no obstacles to the completion of this loan will present themselves after I have gone, and that you will obtain the money as soon as may be.

Very truly, SAM'L P. COLT.

[*Exhibit* 59. *H. E. B., U. S. Com'r.*]

FIFTH AVENUE HOTEL, NEW YORK, *June* 13*th*, 1873.

H. C. ROBINSON, Esq.

DEAR MR. R.: Yours of yesterday with mortgage and note duly received. I have executed the papers and return them. I did not fill in the date on the note, thinking you might wish to date it later than to-day.

I am pleased with the rate of interest, and also that you were able to so near complete the loan before I go.

I sent you the power of attorney yesterday.

Please, on receipt of the money, send it to Barry, his address is L. B. B. Colt, 94 Washington street, Chicago, Ill.; and also advise him where to pay the next six months' interest. I mean that which will be due six months from now. I have just heard from Mr. Harbison that he has sent the other policy of insurance on to Bristol. I will have it forwarded to you, and if the lenders don't care for the policies, you can send them to me at Bristol, and my agent there will look out for them. Mr. Harbison says that he will see that they are renewed this summer.

I believe that I have written all that is necessary. Many thanks for your kind wishes. We are off on the Oceanic at eight to-morrow morning.

Very truly yours, SAM'L POMEROY COLT.

321 [*Exhibit* 60. *H. E. B., U. S. Com'r.*]

PALMER & COLT, ATTORNEYS-AT-LAW,
No. 94 Washington Street, Rooms 16 and 17,
CHICAGO, *June* 17*th*, 1873.

HON. H. C. ROBINSON.

DEAR SIR: Accidentally, on looking over the Colt case, in 33 Conn., I came across the following, as quoted from the will of Col. Colt: "And to each of said executors, in *compensation for services* in the execution of this trust, I hereby give and bequeath, in addition to the legacy and devise hereinbefore given, one-fourth of one per cent. of the cash value of my whole estate." In view of this had the executors a right to charge $5,500 more for trustee services in our special case? I ask for information on this subject. I desire to do what is right. Mr. Hubbard had certainly, once at least, told me it was not the intention of the executors to charge anything, and I was struck with surprise when he announced the intention of so doing, but being anxious for the money, and fearing delay in consequence of the Judge's threats, I was not disposed at that time to question the charge. I now desire an opinion from you as to its legality. Under the will the executors received a large sum for their services.

Pomeroy has left his matters in my charge while he is away. Were the mortgage papers satisfactory, and is there anything else to be done?

Very truly yours, LEBARON B. COLT.

[*Exhibit* 61. *H. E. B., U. S. Com'r.*]

PALMER & COLT, ATTORNEYS-AT-LAW,
No. 94 Washington Street, Rooms 16 and 17,
CHICAGO, *June* 28, 1873.

HON. H. C. ROBINSON, *Hartford, Conn.*

DEAR SIR: Your favor of the 25th instant, with enclosed check

325 Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT *et al.*
vs.
ELIZABETH H. COLT *et al.* } In Equity.

Complainants' Exhibits "*M*," "*N*," *and* "*O*." (*Probate Court Notices.*)

326 *Stipulation.*

The plaintiffs offer in evidence the following copies, namely:

Copy of the notice published in the Hartford Daily Courant in pursuance of the order of the court of probate, holden at Hartford, in the matter of the estate of Samuel Colt, made June 8th, 1866, with reference to the exhibition and allowance of the accounts of the executors of said Samuel Colt, the same to be marked "Copy, Complainants' Exhibit M."

Copy of the notice published in the Hartford Daily Times in pursuance of the order of said court of probate, holden at said Hartford, in the matter of said estate, made Aug. 1st, 1870, with reference to the exhibition and allowance of the said executors' supplementary administration account with said estate, the same to be marked "Copy, Complainants' Exhibit N."

Copy of the notice published in the Hartford Daily Times in pursuance of the order of said court of probate, holden at said Hartford, made Jan. 6th, 1873, with reference to the exhibition and allowance of the account of said executors with said estate, the same to be marked "Copy, Complainants' Exhibit O."

And thereupon it is stipulated that if said evidence is admissible, said notices, copies whereof are hereby offered in evidence, were the only newspaper notices published in pursuance of said orders of said court of probate. That said notices were published in the issues of said newspapers, as follows:

327 Said first notice, in the Hartford Daily Courant, June 11th, 12th, and 13th, 1866.

Said second notice, in the Hartford Daily Times, Aug. 1st and 2, 1870.

Said third notice, in the Hartford Daily Times, for Jan'y 6th, 1873.

And it is further stipulated that said newspapers were and are daily newspapers published in said Hartford.

But the defendants object to the admissibility of said evidence as in any way affecting the validity or conclusiveness of the action of said court of probate in settling or acting upon said several accounts, as it appears from the records of said court, that the parties interested appeared before said court and were duly heard on each of said settlements by the court of probate, and that the orders of court as to giving notice of said hearings had been duly complied with in each case.

It is further stipulated that during the pendency of the suit of

James B. Colt *vs.* Elizabeth H. Colt *et als.*, and up to the time of the majority of Caldwell Hart Colt, said Elizabeth H. Colt was the guardian of said Caldwell Hart Colt.

CHAS. E. PERKINS AND A. P. HYDE,
Counsel for Defendants.
A. PAYNE AND L. C. ASHLEY,
Counsel for Complainants.

328 *Copy of Record.*

Estate of Samuel Colt, late of Hartford, Deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the eighth day of June, 1866. Present: James Nichols, judge.

Ordered, That the fifteenth day of June, 1866, at 10 o'clock a. m., be, and the same is, assigned for the exhibition and allowance of the executors' accounts with said estate; and this court directs the executors to give public notice to all persons interested therein to appear and be heard thereon, by publishing this order in a weekly newspaper published in Hartford, and posting a copy on the public sign-post in the town where the deceased last dwelt, and return make to this court.

Attest: LUCIUS TUTTLE, *Clerk.*

[Copy.]

Complainants' Exhibit M. W. H. Barney, Notary Public.

[From the Hartford Daily Courant, for June 11th, 12th, and 13th, 1866.]

At a court of probate holden at Hartford, within and for the district of Hartford, on the 8th day of June, A. D. 1866. Present: James Nichols, Esq., judge.

On motion of Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H. Jarvis, executors of the last will and testament of Samuel Colt, late of Hartford, within said district, deceased. It is ordered by this court that notice shall be given that the administration account in said estate will be exhibited for settlement at the probate office, in said district, on the 15th day of June, 1866, at 10 o'clock a. m., by posting a copy of this order on the public sign-post in said town of Hartford, and by advertising the same in a newspaper published in Hartford.

Certified from record.

je11 3d. LUCIUS TUTTLE, *Clerk.*

329 *Copy of Record.*

Estate of Col. Samuel Colt, late of Hartford, deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the first day of August, 1870. Present: John H. White, judge.

Ordered, That the fifth day of August, 1870, at 2 o'clock p. m.

be, and the same is assigned for the exhibition and allowance of the executors' supplementary administration account with said estate; and this court directs the executors to give public notice to all persons interested therein to appear and be heard thereon, by publishing this order in a daily newspaper, published in Hartford, and posting a copy on the public sign-post where the deceased last dwelt, and return make to this court.

Attest: P. F. BUTLER, *Clerk.*

[Copy.]

Complainants' Exhibit N. W. H. Barney, Notary Public.

[From the Hartford Daily Times for Aug. 1st and 2d, 1870.]

At a court of probate holden at Hartford, within and for the district of Hartford, on the 1st day of August, A. D. 1870. Present: John H. White, Esq., judge.

On motion of R. D. Hubbard, one of the executors on the estate of Samuel Colt, late of Hartford, within said district, deceased: It is ordered by this court, that notice shall be given that a supplemental account in said estate will be exhibited for settlement at the probate office in said district, on the 5th day of August, 1870,
330 at 2 o'clock p. m., by posting a copy of this order on the public sign-post in said town of Hartford, and by advertising the same in a newspaper published in Hartford.

Certified from record.

aug 1 2d. P. F. BUTLER, *Clerk.*

Copy of Record

Estate of Samuel Colt, late of Hartford, deceased.

At a court of probate holden at Hartford, in and for the district of Hartford, on the sixth day of January, 1873. Present: John H. White, judge.

Ordered, that the tenth day of January, 1873, at 10 o'clock a. m., be, and the same is, assigned for the exhibition and allowance of the executors' account with said estate; and this court directs the executors to give public notice to all persons interested ther ein to appear and be heard thereon, by publishing this order in a daily newspaper published at Hartford, and posting a copy on the public sign-post in the town where the deceased last dwelt, and return make to this court.

Attest: P. F. BUTLER, *Clerk.*

[Copy.]

Complainant's Exhibit O. W. H. Barney, Notary Public.

[From the Hartford Daily Times for January 6th, 1873.]

At a court of probate, holden at Hartford, within and for the dis-

trict of Hartford, on the 6th day of Jan., A. D. 1873. Present: John H. White, Esq., judge.

331 On motion of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors on the estate of Samuel Colt, late of Hartford, within said district, deceased, it is ordered by this court, that notice be given that the final administration account in said estate will be exhibited for settlement at the probate office in said district, on the 10th day of January, 1873, at 10 o'clock a. m., by posting a copy of this order on the public sign-post in said town of Hartford, and by advertising the same in a newspaper published in Hartford.

Certified from record.

Id. P. F. BUTLER, *Clerk.*

332 And on the 22d day of July, 1881, opinion of court was filed in the words and figures following, viz.:

Circuit Court of the United States for the District of Connecticut.

LEBARON B. COLT and others
vs.
ELIZABETH H. COLT and others.

BLATCHFORD, J.: This case involves questions arising under the will of Samuel Colt and the codicils thereto. The will was executed June 6th, 1856. Only certain provisions in the will and codicils need be noticed. The only property involved in this suit are shares of the capital stock of Colt's Patent Fire-arms Manufacturing Company, and the dividends thereon. That company was a corporation. Its capital stock consisted of 10,000 shares of $100 each, of which the testator owned 9,996 at the time of his death. He died January 10th, 1862. The will gave to his wife, the defendant Elizabeth H. Colt, a gross legacy of money and "the use and improvement, during her life," of 1,000 shares of said stock, and, subject to said bequest, it gave said stock to the children which should thereafter be born to him in lawful wedlock, and their heirs, as an absolute estate in fee simple. It also gave to each of the children which might thereafter be born to him in lawful wedlock, 500 shares of said stock. It also gave to his brother James B. Colt, "the use and improvement, during his life," of 500 shares of said stock, and, after the death of his said brother,

333 "to his issue, lawfully begotten, as an absolute estate," on condition that said James B. Colt should "waive and relinquish all claims and demands, actual or pretended," which he might have against the testator or against said company. It also gave to his executors and their successors in said office 500 shares of said stock, "in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said

stock, and all accumulations thereof, if any, shall go to said issue in equal proportions as an absolute estate." It also gave to the defendant, Samuel C. Colt, a legacy of money in gross and 500 shares of said stock. It also gave to the plaintiff, Isabella DeWolf Colt, (now the wife of the plaintiff, Frank E. DeWolf,) a legacy of money in gross and 100 shares of said stock, she being a daughter of his late brother, Christopher Colt, and to each of the other children of his said brother, Christopher Colt, a legacy of money in gross and 100 shares of said stock. It also gave to L. P. Sargeant, under certain contingencies, 50 shares of said stock; and to E. K. Root, under certain contingencies, 50 shares of said stock; and to M. Joslin, under certain contingencies, 50 shares of said stock; and to J. Dean Alden, under certain contingencies, 25 shares of said stock. It also gave to certain persons, as trustees, 2,500 shares of said stock to establish a school for the education of practical mechanics and engineers. It also gave "to each of my executors hereinafter" 50 shares of said stock. The will then proceeded:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire arms Manufacturing Company of which I shall die possessed shall be divided among the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in
334 which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions. I hereby nominate and appoint my wife, Elizabeth Hart Colt, and my friends, Richard D. Hubbard and Henry C. Deming, of said city of Hartford, to be executors of this will, with all such powers and authorities as may be necessary to execute the same; and, in case my wife shall decline this trust, I hereby nominate and appoint Richard W. H. Jarvis, of Middletown, Conn., in her stead, and, in case the office of either of said executors shall become vacant by death, resignation, or otherwise, at any time thereafter, I hereby authorize and empower my surviving or remaining executors to nominate and appoint a successor to fill said vacancy. And to each of said executors, in compensation for services in the execution of this trust, I hereby give and bequeath, in addition to the legacy and devise hereinbefore given, one-fourth of one per cent. of the cash value of my whole estate."

On the 12th of January, 1858, the testator executed a codicil to said will, which contained the following provisions:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of Colt's Patent Fire-arms Manufacturing Company, given in the aforesaid will to said James B. Colt for life, remainder to his children; and, in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

It also gave to J. Deane Alden 50 shares of said stock, in
335 lieu of 25 shares named in said will, subject to the conditions named in said will. It also revoked the appointment of Henry C. Deming as executor, and appointed in his place R. W. H. Jarvis. It then continued:

"I also revoke and cancel the legacy given in said original will to the children of my late brother, Christopher Colt, so far as the oldest son of my said brother is concerned, and so far only, and in lieu thereof I give and bequeath to said oldest son one-fourth part of what he would have received if the legacy to him in said original will had not been revoked."

On the 2d of February, 1859, the testator executed a second codicil to said will, which stated that it was in addition to said codicil of January 12th, 1858. It cancelled and revoked the legacy made by the original will and codicil to trustees for founding said school. It also contained the following provisions:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them. I give to the oldest son of my brother, Christopher Colt, a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said oldest son not being included herein) the property, to wit, five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which, in and by said original will, is bequeathed to my executors in trust for the use of the children of the said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will as altered, changed, and modified by this and the previous colicil, as and for my last will and testament."

336 The will and the two codicils were proved and approved

stock, and all accumulations thereof, if any, shall go to said issue in equal proportions as an absolute estate." It also gave to the defendant, Samuel C. Colt. a legacy of money in gross and 500 shares of said stock. It also gave to the plaintiff, Isabella DeWolf Colt, (now the wife of the plaintiff, Frank E. DeWolf,) a legacy of money in gross and 100 shares of said stock, she being a daughter of his late brother, Christopher Colt, and to each of the other children of his said brother, Christopher Colt, a legacy of money in gross and 100 shares of said stock. It also gave to L. P. Sargeant, under certain contingencies, 50 shares of said stock; and to E. K. Root, under certain contingencies, 50 shares of said stock; and to M. Joslin, under certain contingencies, 50 shares of said stock; and to J. Dean Alden, under certain contingencies, 25 shares of said stock. It also gave to certain persons, as trustees, 2,500 shares of said stock to establish a school for the education of practical mechanics and engineers. It also gave "to each of my executors hereinafter" 50 shares of said stock. The will then proceeded:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire arms Manufacturing Company of which I shall die possessed shall be divided among the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in
334 which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions. I hereby nominate and appoint my wife, Elizabeth Hart Colt, and my friends, Richard D. Hubbard and Henry C. Deming, of said city of Hartford, to be executors of this will, with all such powers and authorities as may be necessary to execute the same; and, in case my wife shall decline this trust, I hereby nominate and appoint Richard W. H. Jarvis, of Middletown, Conn., in her stead, and, in case the office of either of said executors shall become vacant by death, resignation, or otherwise, at any time thereafter, I hereby authorize and empower my surviving or remaining executors to nominate and appoint a successor to fill said vacancy. And to each of said executors, in compensation for services in the execution of this trust, I hereby give and bequeath, in addition to the legacy and devise hereinbefore given, one-fourth of one per cent. of the cash value of my whole estate."

On the 12th of January, 1858, the testator executed a codicil to said will, which contained the following provisions:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of Colt's Patent Fire-arms Manufacturing Company, given in the aforesaid will to said James B. Colt for life, remainder to his children; and, in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

It also gave to J. Deane Alden 50 shares of said stock, in
335 lieu of 25 shares named in said will, subject to the conditions named in said will. It also revoked the appointment of Henry C. Deming as executor, and appointed in his place R. W. H. Jarvis. It then continued:

"I also revoke and cancel the legacy given in said original will to the children of my late brother, Christopher Colt, so far as the oldest son of my said brother is concerned, and so far only, and in lieu thereof I give and bequeath to said oldest son one-fourth part of what he would have received if the legacy to him in said original will had not been revoked."

On the 2d of February, 1859, the testator executed a second codicil to said will, which stated that it was in addition to said codicil of January 12th, 1858. It cancelled and revoked the legacy made by the original will and codicil to trustees for founding said school. It also contained the following provisions:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them. I give to the oldest son of my brother, Christopher Colt, a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said oldest son not being included herein) the property, to wit, five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which, in and by said original will, is bequeathed to my executors in trust for the use of the children of the said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will as altered, changed, and modified by this and the previous colicil, as and for my last will and testament."

336 The will and the two codicils were proved and approved

and ordered to be recorded in the probate office of the probate court within and for the county of Hartford, in the State of Connecticut, on the 6th of February, 1862. The bill in this case is filed by Theodora G. Colt, widow of said Christopher Colt, (as assignee of the interest of Edward D. Colt, deceased, who was her son, and a son of Christopher Colt,) and by LeBaron B. Colt, Samuel P. Colt, and Isabella DeWolf Colt DeWolf, (three children of said Christopher Colt,) in their own right, and by Frank E. DeWolf, husband of said Isabella. The eldest son of said Christopher Colt was George D. W. Colt. At the time of the death of the testator the said Isabella was of age, and the said Edward D., LeBaron B., and Samuel P. were minors. Edward D. became of age on the 28th of May, 1865; LeBaron B. on the 25th of June, 1867, and Samuel P. on the 10th of January, 1873. The said Theodora G. Colt was, as early as January, 1863, appointed by the said probate court the general guardian of the persons and the estates of the said Edward D., LeBaron B., and Samuel P. Letters testamentary on said will and codicils were issued by said probate court to Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H. Jarvis. Four children were born to the testator and Elizabeth H. Colt. Two of them, Samuel J. and Elizabeth E., died without issue, after the execution of the codicils and before the death of the testator. One of them, Henrietta J., died without issue, a few days after the death of the testator. The said Elizabeth H. Colt became her administratrix. The fourth child, Caldwell H. Colt, is still living. While he was a minor the said Elizabeth H. Colt was his guardian. Joslin and Alden, named in the will, died before the testator.

On the 1st of June, 1864, the said James B. Colt brought a suit in equity in the superior court of the State of Connecticut for the county of Hartford. The suit was commenced by a petition. It set forth a copy of the will and of each of the two codicils. It claimed that James B. Colt had thereunder an interest, absolutely or for his life, in such proportion of the
337 excess of the stock of said company owned by the testator at the time of his death above the amount of stock disposed of in said will, as 500 shares bear to the whole amount of legacies thereof given in said will. It set forth the names of the persons then living who were interested in the 9,996 shares. It set forth as so interested, among others, Isabella DeWolf Colt (then unmarried,) and the said Edward D., LeBaron B., and Samuel P., and averred that Theodora D. Colt (who is the same person as the plaintiff, Theodora G. Colt,) was the guardian of the last named three persons; that the inventory of the estate amounted to $3,257,644.63; that none of said stock or the dividends thereon would be needed to pay debts, and all thereof could be transferred and paid over to the legatees entitled thereto; that the executors had received dividends on the stock in which the petitioner was interested, but they denied that he had any interest in any of said stock or dividends,

and that the amount of the stock and dividends to which he was entitled was over $200,000. The petition went on to say:

"And this petitioner avers that the respondents to this petition, and each of them have, or claim to have some interest, either legal or beneficial in said residuary portion of said stock, and that it is necessary that they, and each of them, should be made parties to this proceeding; that their respective rights in said residuum may be so ascertained and fixed as to be binding on all said parties."

The petition prayed that the court would "ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will," and that the executors pay to the petitioner the dividends already collected or due, with interest, belonging to the shares of stock in which he held an interest under said will, and that he have the future dividends thereon. On this petition process was issued by a justice of the peace, directing the summoning of the following persons named in the process to appear before said superior court on the third Tuesday of July, 1864, to answer unto the foregoing petition, and show cause why its prayer should not be granted: Elizabeth H. Colt, as claiming an interest under
338 said will, and as executrix of it, and as administratrix of Henrietta J. Colt, and as guardian of Caldwell H. Colt; Richard D. Hubbard, as claiming an interest under said will, and as executor of it; Richard W. H. Jarvis, as claiming an interest under said will, and as executor of it; E. K. Root, Henry C. Deming, Caldwell H. Colt, Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, Samuel P. Colt, Theodora D. Colt, guardian of the last named three persons, Samuel C. Colt, and Luther P. Sargeant. The record of said suit in equity shows that the petition and the summons thereon were personally served on the 2d of June, 1864, on the said Elizabeth H. Colt, Richard D. Hubbard, Richard W. H. Jarvis, E. K. Root, Henry C. Deming, Caldwell H. Colt, Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, Samuel P. Colt, Theodora D. Colt, and Samuel C. Colt, and on the twenty-ninth day of June, 1864, on the said Luther P. Sargeant. At the September term, 1865, of said superior court, an order was made by it, reciting that said petition was brought by James B. Colt against the 13 respondents before named, to said court, at said July term, 1864, and reciting the substance of the contents of said petition, and referring to it as on file, and then stating that "this court doth find that the said petition was duly served and returned to this court at a term thereof holden on the third Tuesday of July, A. D. 1864, when the parties appeared by their respective counsel, and the said minors were duly represented by their guardians, and the said cause was continued to —— when the defendants filed a demurrer to said petition, and the parties were at issue thereon, and this court having heard them by their respective counsel, adjudged said demurrer insufficient, and overruled the same, and ordered the respondents to answer over, and, by legal answer and continuances

the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegation in the plaintiff's bill as on file, and now the court, upon due inquiry and examination made, doth find as follows:"

339 The order then set forth the will and the codicils and *status* of the stock and the parties, as before stated, with the fact that Edward D. Colt had, since the last term of the court, arrived at his majority, and that the executors had refused to pay over to James B. Colt any part of the dividends on said stock, because they were advised that, under the will and the codicils, he took no interest in said stock, or, if otherwise, that the nature and extent of his interest was so uncertain that they could not safely transfer said stock or any interest therein, or pay the dividends thereon to him, until specifically advised by the judgment of the court in respect to the nature and extent of said interest, and also because the time allowed by the court of probate for the settlement of the estate had not expired. The order then proceeded:

"This court reserves for the advice of the supreme court of errors next to be holden in the county of Hartford, the following questions arising on the foregoing record:

"1. Whether the interest taken in the residuum by James B. Colt is a life estate, or an estate in fee.

"2. Whether said Colt shall receive interest upon the dividends made on his residuary stock, and, if so, from what time.

"3. Have the legacies which the children of the testator who deceased in his lifetime would have taken had they survived him, lapsed, or are they to be considered and treated as intestate estate?

"4. Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will?

"5. Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock under said will, or only one of them, or neither of them?

"6. What is the amount of the residuum of stock and who are entitled thereto, and in what proportions? This court also reserves all other questions arising upon the record, and also the question as to what decree shall be passed in this suit."

The said supreme court of errors, at its February term, 1866, for Hartford county, made an order in said suit in equity, reciting the parties, as before named, and the reservation of said ques-

340 tions for its consideration and advice, and then proceeding:

"And now, said parties having been fully heard, this court doth consider, and doth advise said superior court, 1st, That the interest of James B. Colt in the residuum of stock is a life estate only; 2d, That James B. Colt is not to receive interest on the dividends of stock, unless the superior court, on further inquiry, find that interest has been made by the executors, or the money has been used by them, or by the Arms Company in their business,

so that they may fairly be said to have made interest upon the money, either directly or otherwise; 3d, That the legacies to the deceased children who died before the testator, are to be treated as intestate estate; 4th, That the children of Christopher do not take any share in the residuum of stock, in respect to their legacy of 500 shares given to them in the codicil to said will; 5th, Jarvis takes, Deming does not; 6th, The amount of residuum of stock is 5,346 shares, of which Mr. S. Colt takes 1,149 2/31; J. B. Colt, for life, 574 2/31; Samuel C. Colt, 574 2/31; Henrietta Colt, deceased, 574 2/31; Elizabeth E. Colt, deceased, 574 2/31; Samuel J. Colt, deceased, 574 2/31; Christopher's children, 459 7/31; Caldwll H. Colt, 574 2/31; R. D. Hubbard, executor, 57 1/31; R. W. H. Jarvis, executor, 57 1/31; Mrs. E. H. Colt, executor, 57 1/31; L. P. Sargeant, 57 1/31; E. K. Root, 57 1/31."

At the March term, 1866, of the said superior court, a final decree was made by it, reciting, that the said petition of James B. Colt was brought to the term of said court held on the third Tuesday of July, 1864, "to which court the same was made returnable, when and where the petitioner appeared, and the respondents also appeared;" that "the respondents thereupon demurred to the sufficiency of said petition, which demurrer was overruled, and, by legal continuances, the said action came to the term of said court holden on the fourth Tuesday of September, A. D. 1865, when and where the respondents filed their answer, as on file, and this court, upon a hearing, found the following facts as proved in said case:"

The decree then quotes the findings contained in said prior order made at the September term, 1865, including the matter before
341 quoted herein from said prior order, and state the reservation for the advice of the supreme court of errors, of the six questions before set forth, in the terms before quoted herein from the prior order, and then proceeds: "And now, in pursuance of the advice of the supreme court of errors, given upon the reservation aforesaid, and upon further hearing before this court upon the question of interest upon dividends heretofore declared, this court doth order, adjudge, and decree as follows, viz.: That the legacies by said will to certain children of the testator who deceased before him, are to be treated as intestate estate; that the children of Christopher Colt do not take any share in the residuum of stock in respect to their legacy of five hundred shares of said stock given to said executors in trust for them in the codicil of said will, that the said Henry C. Deming does not take under said will the legacy of fifty shares given by said will to each of the executors thereof, nor does he take any interest in the residuum, but the said Richard W. H. Jarvis does take said legacy of fifty shares, and does also take a proportionate interest in the residuum. The amount of residuum of stock is five thousand three hundred and forty-six (5,346) shares, of which Mrs. S. Colt takes, in the manner specified in said will, 1,149 2/31 shares; James B. Colt, for life, 574 2/31 shares;

Samuel C. Colt, in the manner specified in said will, $574\frac{26}{31}$; Caldwell H. Colt, $574\frac{26}{31}$; Henrietta Colt, deceased, $574\frac{26}{31}$; Elizabeth E. Colt, deceased, $574\frac{26}{31}$; Samuel J. Colt, deceased, $574\frac{26}{31}$; children of Christopher Colt, in the manner specified in the will, $459\frac{27}{31}$; R. D. Hubbard, executor, $57\frac{15}{31}$; R. W. H. Jarvis, executor, $57\frac{15}{31}$; Mrs. S. Colt, executor, $57\frac{15}{31}$; L. P. Sargeant, $57\frac{15}{31}$; E. K. Root, $57\frac{15}{31}$. And this court doth further find that the right, title, and interest of the said James B. Colt in and to the aforesaid $574\frac{26}{31}$ shares of stock is a life estate only." The court further found that the net amount of dividends on said $574\frac{26}{31}$ shares, since the death of the testator, to which said James B. Colt and his assigns were entitled, with interest thereon, and deducting income tax paid by the executors, amounted to $84,575.01, which amount
342 the decree required the executors to pay to said James B. Colt and his assigns, with $330.09 as the costs of said petition. This decree was made May 21st, 1866.

In pursuance of the will and codicils, and the said decree of the Connecticut court, the executors proceeded, in May and June, 1866, to dispose of the 9,996 shares of stock, and the accumulated dividends thereon. The dividends up to that time, from the death of the testator, had amounted to 150 per cent. on the par of the stock, being, on the 9,996 shares, $1,499,400. They paid to the parties determined by said decree the back dividends on their primary legacies of stock, and on their legacies of the residuary stock. They held in reservation for Mrs. S. Colt, for her life, her 1,000 primary shares and her $1,149\frac{21}{31}$ of the residuary shares. They transferred to Caldwell H. Colt his 500 primary shares and his $574\frac{26}{31}$ of the residuary shares, and to Richard W. H. Jarvis, administrator of Henrietta J. Colt (in place of Elizabeth H. Colt, the 500 primary shares and the $574\frac{26}{31}$ of the residuary shares, belonging to Henrietta J. Colt. They passed over to the distributors of the estate the 500 primary shares and the $574\frac{26}{31}$ of the residuary shares given to Samuel J. Colt, and the 500 primary shares and the $574\frac{26}{31}$ of the residuary shares given to Elizabeth E. Colt, and adjudged to be treated as intestate estate, and which shares the probate court directed to be distributed, one-third to Mrs. Elizabeth H. Colt, one-third to Caldwell H. Colt, and one-third to Henrietta J. Colt, to be held by her administrator, R. W. H. Jarvis. Those $2,149\frac{21}{31}$ shares were transferred by the executors accordingly. They held in reserve for James B. Colt and his assignees, for the life of said James B., his $574\frac{26}{31}$ of the residuary shares. They held in reserve for the four children of Christopher Colt (Isabella, Edward D., LeBaron B., and Samuel P.) the 500 primary shares given to them by the second codicil, and the accumulated dividends thereon, as required, until the youngest of them should become of age, less what was allowed for their education; and, when that event happened, they, in January, 1873, transferred to each of the four
343 125 shares, and paid to each of them one-fourth of said accumulated dividends, the said Theodora D. Colt taking the share of Edward D. Colt, then deceased, as his assignee. They trans-

ferred to Samuel C. Colt his 500 primary shares and his $574\frac{6}{31}$ of the residuary shares. They transferred to the said Isabella her 100 primary shares and her $114\frac{30}{31}$ of the residuary shares, and to the said Edward D. his 100 primary shares and his $114\frac{30}{31}$ of the residuary shares. They held in reserve for the said LeBaron B. and the said Samuel P., each of them, his 100 primary shares and his $114\frac{30}{31}$ of the residuary shares, and transferred to each of them his shares when he became of age. They transferred to the estate of L. P. Sargeant its 50 primary shares and its $57\frac{15}{31}$ of the residuary shares, and to the estate of E. K. Root its 50 primary shares and its $57\frac{15}{31}$ of the residuary shares; and to each of the three executors his or her 50 primary shares and his or her $57\frac{15}{31}$ of the residuary shares. The back dividends received by the executors on the stock were all disposed of, by either being paid, at the proper time to the parties receiving the transfers of stock, or by being paid into the general estate of the testator, and so distributed, because decided not to belong to the parties receiving the stock as legacies.

Powers of attorney were given by the executors to Mrs. S. Colt and to James B. Colt respectively, to draw, during their respective lives, the dividends on their respective life shares of stock. Thus, all the stock and all the back dividends on it, and all control over future dividends on it, was parted with by the executors, as such, before this present suit was brought, under what they relied upon as competent judicial authority purporting to dispose of the title to said stock and dividends, in a suit to which all persons interested therein were supposed by the executors, and by the parties to the suit, and by the courts which adjudicated the questions raised and decided, to have been parties, except that the $2{,}149\frac{1}{31}$ shares set apart for Mrs. S. Colt for life remain, to go, after her death, as prescribed by the will, and the $574\frac{6}{31}$ shares which James B. Colt
344 enjoyed for his life remain now in the names of the executors, to go, with the dividends thereon since his death, to whoever may be entitled to them, James B. Colt having died on the 28th of October, 1878.

It does not appear, from any record put in evidence in the present suit, what questions were raised or decided on the demurrer to the sufficiency of the petition, nor that anything was decided thereon except to overrule the demurrer, nor is any order on the demurrer set forth, except what is recited as to its being overruled, in the order and the decree of the superior court which are set forth, nor does the record show that the questions raised on the demurrer were adjudged by the supreme court of errors, except as oral testimony alludes to that fact. But, all parties have referred to the reports, in the supreme court of errors, of the case of Colt *v.* Colt, (32 Connecticut, 422,) and of the case of Colt *v.* Colt, (33 Connecticut, 270,) as if they were made part of the record. The case in 32 Connecticut is a report of the suit brought in the superior court, on the demurrer to the petition, and states that the case on the demurrer was reserved for the advice of the supreme court of errors. It gives

arguments of counsel in support of and against the demurrer, and shows that the questions raised and adjudged were as to the right of James B. Colt to a life estate in residuary shares of said stock, in virtue of the primary legacy of 500 shares to him in the original will, although such primary legacy was revoked by the first codicil, and as to the jurisdiction of the superior court over the subject matter of the suit, and as to whether the case was one of equitable cognizance.

The decision of the supreme court of errors discussed and covered all those points, and it advised that the demurrer be overruled. The case in 33 Connecticut is a report of the action of the supreme court of errors on the six questions reserved by the superior court for the advice of the former court on the facts found by the latter court, and the decision of the court assigns its reasons for its answers to the questions.

The bill in the present case is filed against Elizabeth H.
345 Colt, widow and executrix, and as trustee for the children of Christopher Colt, and guardian of Caldwell H. Colt, (a legatee and claiming as heir of Samuel J. Colt and Elizabeth E. Colt, legatees,) and as claiming an interest under said will; Richard D. Hubbard, executor and as such trustee, and as claiming an interest under the will; Richard W. H. Jarvis, executor and as such trustee, and as claiming an interest under the will, and as administrator of Henrietta J. Colt; Caldwell H. Colt; Samuel C. Colt; the executors of E. K. Root; the executors of Luther P. Sargeant; Alice B. Colt, Norman Colt, and James Colt, children and heirs-at-law of James B. Colt, and Hugh Harbison, administrator of James B. Colt.

The bill sets forth the will and the codicils, and the proceedings thereon, and the qualifying of the executors. It alleges that, by the clause in the second codicil to the will, the four children of Christopher Colt were substituted for the children of James B. Colt under the clause in the original will relating to the 500 shares given in trust for the issue of James B. Colt; that the plaintiff, Theodora G. Colt, became on the 6th of June, 1879, the owner by assignment from the administrator of Edward D. Colt, deceased, of all the right of his estate in the residuary estate and stock, and the accumulations thereon, formerly belonging to the estate of Samuel Colt; that 5,346 shares of said stock passed under the residuary clause of the will; that the said children of Christopher Colt have received under the will only 100 shares each of the stock legacies, and 460 (meaning $459\frac{75}{81}$) shares of the residuary stock in respect of said 400 shares and the accumulations thereon, the gross legacies to each and the residuum thereon; and the 500 shares of stock and dividends thereon, so given in trust for them, which 500 shares and the accumulations thereon were paid over to them on the 11th of January, 1873, deducting credits for education during their minority, according to the trust; that, in addition, they are entitled under the will and codicils to $574\frac{76}{81}$ "additional shares, and more, together with

the dividends and accumulations thereon," for the following reasons:

346 (1.) In respect to the legacies of 100 shares each of the stock to said children of Christopher, they were entitled each to more shares of the residuary stock than what they so received, and accumulations thereon.

(2.) The gift to trustees of 500 shares of stock in trust for the children of Christopher, in place of the children of James B., carried to the trustees, and entitled the said Isabella, Edward D., LeBaron B., and Samuel P., under the residuary clause of the will, to receive such proportion of the stock bequeathed by the residuary clause, as said 500 shares bears to the whole amount of the other legacies of stock given in the will and codicils, and the dividends declared and accrued thereon since the death of the testator.

(3.) Said children of Christopher are also entitled, under the residuary clause of the will, to such proportion of the $574\frac{2}{3}\frac{6}{1}$ shares of residuary stock, now in the hands of the executors, in which said James B. claimed a life estate, as said gift of 500 shares in trust and said legacies of 100 shares each to said children (making 900 shares in all), bears to the whole amount of legacies of stock given in the will.

(4.) As the plaintiffs have hitherto received less than their lawful proportion of the residuary stock and the accumulations thereon, they are now entitled to receive the whole of the $574\frac{2}{3}\frac{6}{1}$ shares now in the hands of the executors, the income of which was paid to James B. during his life, in order to aid in making them equal with the other residuary legatees; and that, so far as any of said residuary stock and the accumulations thereon, rightfully appertaining to them or to their said trustees in trust for them, have been transferred to said executors and trustees personally, and distributed and transferred to other parties who, or whose legal representatives, are defendants herein, the equities between said defendants and the plaintiffs in the premises should now be adjusted by the court, so as to make good and restore to the plaintiffs the stock rightfully belonging to them under the will and codicils, and the accumulations thereon.

The bill also alleges, that, when the testator died, the said Edward D., LeBaron B. and Samuel C., were minors; that the last two

347 continued minors until after the termination of proceedings had in the superior court and the supreme court of errors with reference to the will and codicils; that the rights of said children, under the will and codicils, could be lawfully asserted only by a guardian *ad litem*, in the matter of their claims to residuary stock in respect of said legacy of 100 shares each, and by said executors in their capacity as trustees, in the matter of their claim to residuary stock in respect of the 500 shares given to said executors in trust; that said children were not, in said proceedings, or in any proceedings with reference to their claims to residuary stock, in respect of said legacies of 100 shares each, represented by any guard-

ian *ad litem*, or by any one in any capacity, and in respect to their rights to residuary stock under said gift to said trustees for them of said 500 shares of stock, in place of the rights of said children being asserted by said trustees, the plaintiffs were informed, on the 27th of December, 1878, that said executors not only did not appear and urge the claims of said children in respect of said residuary stock under said gift of 500 shares of stock, but waived the same, and by counsel and by written brief opposed the claims of said children in respect thereof, so that, in fact, the claims of said children under said will were at no time legally made, set up, heard, or passed upon, in any of the proceedings with reference to said will and codicils; that, had said children been represented in said proceedings, and their claims presented and urged in respect to said legacies to them directly of said 100 shares each, and in respect of said legacy of 500 shares in trust, said additional shares of stock and accumulations thereon, as claimed in said bill, would have been delivered and paid over to them; that said executors and trustees pretend that said children of Christopher are not entitled by reason of said legacy of 500 shares in trust to any share in the original residuary stock, or to any share in the $574\frac{6}{31}$ shares of residuary stock in which said James B. has enjoyed a life estate, or to any additional residuary stock and dividends in respect of said legacies of 100 shares each to said
348 children; and, in support of such pretenses, allege said proceedings as affecting the rights of the plaintiffs; that the plaintiffs are entitled to such additional shares and accumulations thereon, and are not barred from claiming them because of said proceedings, and for the following reasons:

(1.) The said Edward D. arrived at age pending said proceedings, and the said LeBaron B. and Samuel P. continued to be minors until after the termination of said proceedings, and neither of said minor children were represented in said proceedings by a guardian *ad litem*. The only guardian of them pending said proceedings was a general guardian of their persons and estates, to wit, their mother, said Theodora G. Colt, appointed by said probate court, and she had no power to represent them in said proceedings on the questions of their rights and claims under said will and codicils, and did not in fact at any time appear in said proceedings.

(2.) The questions affecting the rights of said children in respect of said legacy of 500 shares in trust could not be passed upon in any proceedings until the youngest, said Samuel P., arrived at the age of twenty-one years.

(3.) The said trustees of said children were not summoned to appear in said proceedings in their capacity as said trustees, and entered no appearance therein in said capacity on behalf of said children, and employed no counsel to appear before said courts in their behalf as said trustees, and in defense of the rights of said children under said residuary clause of said will in respect of said gift of 500 shares of stock in trust, and no issues were made up by said trustees

before said courts, in said proceedings, involving the rights of said children, under said will and codicil, to said residuary stock, in respect of said gift to said trustees, as so claimed.

(4.) If said Colt, Hubbard, and Jarvis, summoned to appear in said proceedings as executors, were deemed to be before said courts as trustees for said children, said proceedings cannot be held to affect or impair the rights of said children under said will and codicils, because said trustees, by their counsel, appeared before
349 said courts and actively opposed the claim of said children to said residuary stock in respect of said gift of 500 shares in trust.

(5.) Said Theodora G. Colt, during the pendency of said proceedings, was unacquainted with legal business, and, owing thereto, did not apprehend it to be her duty as guardian of said minor children to appear in response to the citation annexed to the bill in the superior court, in their behalf, or as such guardian, and did not in fact employ counsel to appear, or herself appear, to defend against, or to answer, or to become a party to, said bill, in either of said courts; and the said Isabella was, at the time of said proceedings, also unacquainted with legal business, and, owing thereto, employed no counsel to appear for her or to defend her interest, and supposed, as did also her husband, until about the 1st of January, 1879, that said executors had advocated her claims in her behalf, and had endeavored to present them properly to said courts in her behalf.

The bill further alleges that the executors, on the probate of the will, took upon themselves the execution of all the trusts therein contained, and from time to time thereafter assumed to act as trustees under said bequests to them in trust for the plaintiffs, and have continued so to act ever since, and are accountable as such to the plaintiffs, and now hold in trust for the plaintiffs said $574\frac{26}{31}$ shares in which said James B. formerly claimed a life estate; and that said Colt, Hubbard, and Jarvis sometimes further pretend, that, on the 11th of January, 1873, on the strength of having transferred and paid over to the plaintiffs 500 shares bequeathed to them as trustees for the plaintiffs, and the accumulations thereon, they obtained from each of the plaintiffs certain written instruments, purporting in each case to be a receipt to said respondents as trustees, and releasing and discharging said respondents, trustees as aforesaid, from all further accountings, actions, or causes of action for or on account of said trust thereof, and further pretend, that, on the strength of having paid over and transferred to the plaintiffs the property coming to the plaintiffs from them, as executors, under the terms of said will, they at that time, as executors, obtained
350 from the plaintiffs a certain other written instrument, acknowledging the receipt from them, as executors, of $2,975.24, as the proportional share of the plaintiffs in the balance then in the hands of said executors, and also acknowledging the receipt of the various other property coming to the plaintiffs from said respond-

ents, as executors, and, in consideration thereof, releasing the said respondents, as executors, from all further accountings, actions, and causes of action therefor, except as to the question of their interest in the remainder of the said $574\frac{26}{31}$ shares claimed to have been bequeathed to said James B. for life. The receipts to the trustees were four in number, under seal, and in this form:

"Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of 500 shares of the capital stock of the Colt's Patent Fire-arms Co., bequeathed in said will to said trustees in trust for the children (except the oldest) of Christopher Colt, and of the accumulations thereof, viz., shares, 125—cash, $37,159.01, in consideration whereof I hereby release, discharge, and acquit the said Colt, Hubbard, and Jarvis, trustees as aforesaid, of and from any and all further accountings, actions, or causes of action for and on account of said trust. January 11, 1873."

There was one receipt to the executors, signed by the four under seal, in this form:

"Received, Hartford, January 11, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of two thousand nine hundred seventy-five dollars and twenty-four one-hundredths ($2,975.24), being our full proportional interest and share in the balance of said estate in hands of said executors, as per their final administration account, this day rendered and accepted in the court of probate; and, having previously received in full the various other sums, legacies, annuities, devises, and distributions coming to us under said will and previous settlements and administrations, to our entire satisfaction, we hereby, in consideration thereof, release, discharge,
and acquit said Colt, Hubbard, and Jarvis, executors
351 as aforesaid, of and from any and all further accountings, actions, and causes of action, excepting, however, the question of our interest in the remainder of the $574\frac{26}{31}$ shares of the capital stock of the Colt's Patent Fire-arms Manufacturing Co., bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined."

The bill alleges that the payments and transfers of stock aforesaid were not a full settlement and satisfaction with and to the plaintiffs of and for the amounts of stock, and the accumulations thereon, to which the plaintiffs and their said trustees are or were entitled under said will; that on the 10th day of January, 1873, the said Samuel P. having attained his majority on that day, the said Frank E. DeWolf, LeBaron B., and Samuel P. arrived at Hartford from distant parts of the country; that on the next day they went to Colt's armory, in Hartford, and there met the said Hubbard and Jarvis; that thereupon certain instruments were drawn, either by or at the dictation of said Hubbard and Jarvis, and the respond-

ents, as trustees, paid over to the plaintiffs the said 500 shares, and the said balance of the accumulations thereon, and, as executors, paid over to the plaintiffs $2,975.24, represented by them to be the balance in their hands, as executors, belonging to the plaintiffs; that said Hubbard and Jarvis made no explanations to the plaintiffs of their rights under said will and codicils, nor that the plaintiffs had any further rights thereunder, other than to receive said amounts; that the plaintiffs had no previous notice or knowledge that the respondents would ask at that time for any receipts or instruments to be made by the plaintiffs; that said instruments were made without deliberation, and without time or opportunity therefor on the part of the plaintiffs, and without full and competent knowledge on their part of their rights under said will and codicils, and in ignorance of the course pursued by said respondents, in said proceedings in said courts, in filing a brief in opposition to their own rights, as trustees of the plaintiffs, and to the rights of the plaintiffs as their *cestuis que trust*, and in ignorance of the manner in which
352 the said decree had been obtained; that the plaintiffs had great confidence in said Hubbard and Jarvis, in the matter of their rights in the premises, especially in view of their fiduciary relations, and were inclined to readily comply with any request from them in relation to the making of any instruments of receipt which said Hubbard and Jarvis might indicate as being necessary and proper, and no allusion was made to said residuary stock, nor was it suggested that said instruments would ever be claimed to be a release of any of the rights of the plaintiffs or of their trustees therein; that said residuary stock, or their porportion thereof, or their or their trustees' interest therein, did not form a part of the transaction, and were not covered by either of said instruments, but the receipts of the trustees related only to the 500 shares and the accumulations thereon referred to therein, and the trust as to said amount of said stock, and cannot be held to extend further than that in its effect, and the receipt to the executors relates only to the property coming to the plaintiffs from the respondents, strictly as executors, on account of the property given by the will directly to the plaintiffs, and not to any stock or property bequeathed to trustees of the plaintiffs, and was not understood by any of said parties as referring to any property given by said will in trust; and that said instruments cover only the amounts of stock, property, and money actually transferred and paid over by the respondents, and were without any other or further consideration therefor, and do not operate as a release for anything further than said amounts.

The bill further alleges that the said Colt, Hubbard, and Jarvis sometimes also pretend that, as executors, they have, from time to time, filed in the court of probate for the district of Hartford, their accounts relative to said estate and its settlement, and that the same were passed upon by said court and duly approved, and are a bar to the prosecution of said claims of the plaintiffs; that the plaintiffs removed from the State of Connecticut, in April, 1866, and have

never since resided in that State, and did not reside there
353 when said accounts were filed; that they received no actual or sufficient notice of the filing of said accounts or of any proposed action thereon; that the plaintiffs, or some of them, were minors at the time of the filing, except when the last one was filed, and on the day that one was filed the youngest attained his majority; that the said trustees of the plaintiffs were not legally cited to appear, and did not appear, and said minors were not legally represented in the proceedings before said court of probate, and were not present and were not bound thereby; and that, in any event, whatever may have been the proceedings in said court of probate, they are not a bar to the prosecution of said rights of the plaintiffs.

The bill prays that said stock claimed by the plaintiffs under said will and codicils, and the accumulations thereon, may be delivered and paid over to the plaintiffs by said executors and trustees, and that they may be decreed to account respecting the residuary stock and accumulations thereon coming into their hands as executors and trustees as aforesaid, and especially with reference to the residuary stock and the accumulations thereon, in respect of and appertaining to said gift of 500 shares of stock to them in trust for said children.

It appears to be conceded by all parties that the stock distributable as residuary stock was 5,346 shares. The plaintiffs contend, that, if it be held that James B. Colt was not entitled to any interest in the 5,346 shares, and that the executors in trust for the children of Christopher (except the oldest) were entitled to some of the 5,346 shares, based on the primary legacy to the executors in trust for said children, of 500 shares, then the distribution of the 5,346 shares would be as follows:

	Shares.
Mrs. S. Colt, for life	$1,149\frac{21}{31}$
The two surviving children	$1,149\frac{21}{31}$
The two deceased children (intestate estate)	$1,149\frac{21}{31}$
The executors, in trust for the children of Christopher (except the oldest) on the 500 shares	$574\frac{26}{31}$
Samuel C. Colt	$574\frac{26}{31}$
354 The children of Christopher (except the oldest) on the 400 shares	$459\frac{27}{31}$
L. P. Sargeant	$57\frac{15}{31}$
E. K. Root	$57\frac{15}{31}$
The executors	$172\frac{14}{31}$
	5,346

In the above event the plaintiffs claim to be entiled to receive, as their $574\frac{26}{31}$ shares of the 5,346, the $574\frac{26}{31}$ shares now in the hands of the executors, and to be entitled to the dividends from the death of the testator on $574\frac{26}{31}$ shares. The amount of those divi-

dends they represent to be 226 *per cent.*, being a total of over $140,000.

The plaintiffs further contend, that if it be held that James B. Colt was entitled to a life estate in some of the 5,346 shares, and also that the executors, in trust for the children of Christopher, (except the oldest.) were entitled to some of the 5,346 shares, based on the primary legacy to the executors, in trust for said children, of 500 shares, then the distribution of the 5,346 shares would be as follows:

	Shares.
Mrs. S. Colt, for life	$1,038\frac{6}{103}$
The two surviving children	$1,038\frac{6}{103}$
The two deceased children (intestate estate)	$1,038\frac{6}{103}$
The executors, in trust for the children of Christopher (except the oldest) on the 500 shares	$519\frac{3}{103}$
James B. Colt, for life	$519\frac{3}{103}$
Samuel C. Colt	$519\frac{3}{103}$
The children of Christopher (except the oldest) on the 400 shares	$415\frac{23}{103}$
L. P. Sargeant	$51\frac{93}{103}$
E. K. Root	$51\frac{93}{103}$
The executors	$155\frac{73}{103}$
	5,346

In the last above-named event the plaintiffs claim that the increase of shares given each legatee by the exclusion of the
355 executors, as trustees for the children of Christopher, (except the oldest,) from sharing in the residuary stock in respect of the 500 shares, was as follows:

	Shares.
Mrs. S. Colt, for life	111.62
The two surviving children	111.62
The two deceased children (intestate estate)	111.62
James B. Colt, for life	55.81
Samuel C. Colt	55.81
The children of Christopher (except the oldest) on the 400 shares	44.65
L. P. Sargeant	5.58
E. K. Root	5.58
The executors	16.74
	519.03

They also claim that while the trustees are responsible to them for so many of said 519.03 shares as belong to said trustees, said trustees have a right to resort to each of the above recipients for the shares so received by said recipients, and which rightfully belonged to the trustees for the plaintiffs; that taking out from the

$574\frac{266}{531}$ shares now in the hands of the executors as the James B. Colt life stock the 55.81 excessive shares he enjoyed the use of, and giving them to the plaintiffs, there remain to be distributed among the legatees, including the plaintiffs, $519\frac{3}{1000}$ shares, as follows:

	Shares.
Mrs. S. Colt	111.62
The two surviving children	111.62
The two deceased children (intestate estate)	111.62
The executors, in trust for the children of Christopher (except the oldest) on 500 shares	55.81
Samuel C. Colt	55.81
The children of Christopher (except the oldest) on the 400 shares	44.65
L. P. Sargeant	5.58
E. K. Root	5.58
The executors	16.74
	519.03

356 They also claim that under the right of the trustees so to resort or recoup, as the amonnts of stock so to be recouped happen to correspond to the amount each legatee is entitled to in such distribution, the entire stock may be taken in recoupment; that the plaintiffs would thus have received through their trustees, under a proper distribution in the first place, $519\frac{3}{1000}$ shares more than they received, with the accumulations thereon from the death of the testator, and that they are also thus entitled, by the death of James B. Colt, to 55.81 shares of the $574\frac{266}{531}$ shares which James B. had for his life, and which are now to be distributed, with the accumulations thereon since the death of James B., thus entitling them to all the $574\frac{266}{531}$ shares.

In respect, however, to these accumulations the plaintiffs, in either of the above two views of distribution, waive all claim against the trustees personally for any dividends which went to L. P. Sargeant, E. K. Root, or James B. Colt, and insist only on the dividends which went to Mrs. S. Colt and her children, and to Hubbard and Jarvis, and to Samuel C. Colt, being the dividends on 407.41 shares, and which they represent to amount to over $100,000. It is thus seen that the pecuniary amount involved in this suit is considerable. The stock claimed is within the control of the executors, but the dividends claimed have been received by the parties who are now called upon to refund them. It is contended by the plaintiffs that their trustees can resort, for these dividends, to the parties defendant, to whom the stock was erroneously distributed.

Elizabeth H. Colt, Mr. Hubbard, and Mr. Jarvis have put in a full answer to the bill. Samuel C. Colt, by answer, adopts it, and so does Elizabeth H. Colt, as guardian of Caldwell H. Colt. Alice Colt, Norman Colt, and James Colt, the children of James B. Colt answer, denying that the plaintiffs are entitled to any part of the

574 $\frac{6}{31}$ shares in which James B. enjoyed a life estate, and alleging that James B. was entitled to a fee in said shares, and that they, as his only heirs-at-law, are entitled to a fee in said shares; also
357 denying that their interest in the residuum of the stock in respect to the legacy of 500 shares given to the executors in trust for the lawful issue of James B. was taken away by any codicil, and claiming that they are entitled to a share in said residuum in respect to said legacy of 500 shares, and claiming that there was no revocation of their interest in said residuum, and admitting all the other allegations in the bill not inconsistent with said denials. No other answers appear to have been put into the bill, nor does it appear whether the other defendants have been served with process.

The answer of Elizabeth H. Colt, Hubbard, and Jarvis, is joint. It admits that they have the 574 $\frac{6}{31}$ shares, the income of which they paid to James B., during his life, and that he is dead. It avers that the said Isabella, LeBaron B., and Samuel P., and also Edward D., were made parties to the petition of James B., and were duly served with process therein; that at that time the said Theodora D., was the mother of the said Edward, LeBaron, and Samuel, who were then minors, and was then their legal guardian, and in her capacity as such guardian, was made a party to said proceedings and served with process therein; that all the plaintiffs and defendants in the present bill, or those who then legally represented them were also made parties to those proceedings; that said minors and their said guardians did in fact appear in said suit by counsel employed for them, to wit, Henry C. Robinson, of Hartford, at the term of the court to which said proceedings were made returnable, and did appear and become parties to said proceedings, and were duly heard therein by said counsel who was so employed by them; that in the decree of said court it was found as a fact that the parties to said proceedings appeared by their respective counsel, and the said minors were duly represented by their guardians; that the said decree in said cause imports absolute verity, and is conclusive as to the matter so found, and is binding and conclusive on the plaintiffs, and that, according to the law and practice in the State of Connecticut, when minors are made defendants in an action at law or equity, and they have a duly appointed guardian, which
358 guardian is cited to appear, and does appear in the suit, it is not usual or necessary to have any special guardian *ad litem* appointed.

The answer recites the said contents of said decree or judgment of March term, 1866, and alleges that it is in full force; that, in pursuance of it, and in accordance with it, they did thereupon divide up and transfer to and among the respective persons so held thereby to be entitled to the same the whole of said residuum of stock, and thereupon filed in the court of probate, for the district of Hartford, their account, as executors, of the settlement of said estate, showing the disposition so made by them of the residuum of said stock, and also of that specifically devised, which said account

was, on the 2d of July, 1866, legally allowed by said court, and said allowance is in full force; that afterwards the said court of probate duly appointed distributors to distribute all the testate estate not specifically devised, and they made such distribution, and the same was, on the 14th of July, 1866, returned to said court, and was by it approved and is still in full force; that, on the 5th of August, 1870, and the 10th of January, 1873, they filed further accounts of the settlement of said estate as such executors, by which said estate was finally settled, which accounts were, on said respective days, allowed by said court, and said allowance is in full force; and that said decree of said superior court, and the orders of said court of probate in the settlement of said estate, and the conveyances of said stock in accordance therewith, are final and conclusive as to all matters therein contained. as against the plaintiffs, and a bar to the further prosecution of this bill, so far as the rights of the plaintiffs to any part of the residuary stock are concerned.

It denies that the plaintiffs are or were entitled to any more shares of said residuum than they have received, or any accumulations thereon.

It sets up the proceedings which took place on the 11th of January, 1873, the said receipts and discharges given to the trustees, and the said receipt and discharge given to the executors, the former as a settlement of all matters connected with the said
359 trust stock, and the latter as a settlement of all claims of the plaintiffs against the estate under the will or otherwise, and against the defendants as executors. As to so much of the bill as refers to their action in the suit of James B., the answer avers that they were cited to appear therein, that they employed counsel in whom they had confidence, to wit, Benjamin R. Curtis, Origen S. Seymour, and William W. McFarland, to appear in said cause and present such questions for the consideration of said court regarding the construction of said will as to them should appear well founded in the law, which was so done by said counsel; and that the defendants, as such executors, "did not appear or act particularly as trustees for or on behalf" of the plaintiffs, because the plaintiffs were duly made parties to the proceeding by themselves and by their guardian, and appeared therein by able counsel and were fully heard. As to so much of the bill as asks for the whole or any part of said $574\frac{6}{31}$ shares of stock in which a life estate was given to said James B., the answer says that the defendants hold the same, as executors, for the persons duly entitled thereto under the will, and are ready to dispose of the same in accordance with the orders of any proper court having jurisdiction thereof, and it submits to the court the question whether or not the distribution of said shares does not by law appertain to the probate court for the district of Hartford, in which such estate was settled.

It is important, in the first place, to see what was decided by the supreme court of errors and the scope of the decisions as to parties and subject matter. It is evident that James B. Colt, the plaintiff

in the suit, supposed that he was bringing before the court, and in the proper way to make the decree in the suit not only binding but final, all the parties whose interests could be affected by the decree for which he asked. The petition avers that the respondents to it have or claim some interest in the residuary stock, (that alone being the subject matter,) and that it is necessary that each of them should be made parties to the proceeding, "that their respective rights in said residuum may be so ascertained and fixed as
360 to be binding on all said parties."

This was the scope of the suit; and the petition accordingly prayed that the court would "ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will." It was necessary that the court should do so, in order to enable it to comply with the further prayer of the petition, "to ascertain and fix the number of shares in which the petitioner has an interest under said will." As the petition and the will and the codicils disclosed who were the parties interested, and showed that the executors were trustees for the children of Christopher in respect of the 500 shares, and that some, and who of said children were minors, and that the executors, as such, and said minors, and the guardian of said minors, were parties, and as it appeared that all of them and all other parties to the suit had been served with process in it, it is manifest that the two Connecticut courts and the parties defendant and their counsel must have believed that there was no defect of parties. No suggestion to such purport appears to have been been made by any party, or counsel, or court; whereas, if there was any such defect of parties, such suggestion was as obvious then to the experienced counsel and the learned courts as it can now be to any one in this suit. It was the interest of all persons then before the superior court that all the proper parties should be before the court, as the residuary stock was to be adjudicated upon and disposed of, and it was distributed under the decree which was made. It would certainly be a most extraordinary result, if Connecticut counsel and Connecticut courts could be held to have been so wanting in discernment as to have permitted the rights of minors to be adjudged without a proper representation before the court of the minors, and of those having the legal title to the property in which the minors were interested. Nor can it be supposed that this point passed *sub silentio*. The question of proper parties was one so important to be considered, that it must have been considered, and the fact that no suggestion in regard to it was raised by parties or court, proves quite as much that a suggestion as to defect of
361 parties occurred and was rejected as without foundation, as it does that it did not occur; while if, when it occurred, it appeared to have the semblance of soundness in it, it would have been formally raised. It appears in 32 Connecticut, that Mr. McFarland, in arguing in support of the demurrer, and urging that the proper forum for the suit was the court of probate, and making other objections to the bill, did not contend that the petition was

demurrable for want of parties, but urged that the bill involved a settlement of the estate, and of the rights of all parties in it.

The main question considered by the supreme court of errors in 32 Connecticut was, whether the revocation, in the first codicil, of the legacy of 500 shares which the will had given to James B. for life, with remainder to his issue absolutely, applied to and cancelled the bequest to James B. Colt, in the will, of his ratable proportion of the residuary stock. The court said, that but for the provisions in said codicil, James B. would have had at least a life estate in 500 shares, and at least a life estate in his ratable proportion of the residue of stock not specifically bequeathed. Guided by the principle that it must be governed by the intention of the testator, to be determined by settled rules, which rules it distinctly lays down, it arrived at the conclusion that the bequest of a share of the residuary stock to James B. had not been revoked. The rules, as it stated them, were these:

(1.) The construction is to be put upon the instrument as a whole, and not upon detached portions of it.

(2.) If there is a codicil, that is to be read in connection with the will, and the construction is to be put upon the whole, as one instrument.

(3.) The intention is to be inferred from the language used by the testator, explained, if necessary, by parol proof of such extrinsic circumstances as will throw light upon the meaning of the words used.

(4.) The court is not at liberty to indulge in conjecture as to what the testator would have done if a particular subject had been brought to his attention, or as to what he may have supposed he had done by the language used in his will.

(5.) The different parts of a will, or of a will and codi-
362 cil, should be reconciled, if possible.

(6.) Where a bequest has been once made it should not be considered as revoked unless no other construction can be fairly put upon the language used by the testator.

Nowhere are the true rules for interpreting a will and codicil, with a view to ascertain the intention of the testator, more appositely or more tersely stated. The court remarked that the revocation was only of the legacy of 500 shares, which was plainly the first 500 shares; that the bequest of the residuary shares was in a different clause of the will from the bequest of the first 500 shares to James B., and had no reference to the first clause except for the purpose of describing the legatees; that James B. was as well specified to be a legatee of residuary stock by describing him as already a legatee, as if the bequest had been of a given number of shares of residuary stock to him by name, in the residuary clause; and that the revocation in regard to James B. was specific, and not in general terms, as in the second codicil, in respect to the children of James B., revoking all legacies before made to them or for their use. The respondents in that case urged that the will and the cod-

icil ought to be read as of the date of the codicil, and that, therefore, after the codicil was executed, James B. was no longer a legatee of the 500 shares, and so the bequest of the residuary shares would not apply to him. To this the court replied, that reading the will as of the date of the codicil would not strike out of the will the clause containing the legacy of 500 shares, but would have the effect merely to insert the codicil as the last clause in the will, and the bequest of the residue to be divided among those "to whom I have hereinbefore given legacies of stock" would still have the construction which the court had given to it. The respondents in that case also urged that the bequest of residuary stock was auxiliary to the previous bequest, and that with the revocation of the earlier one the later one fell. To this the court replied that the rule had no application to these bequests; that there was no connection between different shares of stock and no common use of them, and they could
363 be held with equal convenience separately or together; that no case could be found where it had been held that a revocation of one devise operates as a revocation of another devise of merely the same kind of property; that there would be no propriety in such a rule and no reason for its adoption; and that the implication of a revocation of one legacy from the express specific revocation of another arises solely from the dependence of the former on the latter. The court further observed that the statement, in the codicil, of the dissatisfaction of the testator with the conduct of James B. would alone be no ground for implying a revocation, though, in the case of a doubtful construction, it might, perhaps, turn the scale. The court then alluded to the argument that there was virtually but one legacy to James B. because the testator had determined to divide all of the stock among certain persons in certain proportions, and, not being certain how much there would be at his death, gave certain specified amounts to the legatees in the proportion in which he intended to divide the whole, and then gave, as a part of the same bequest, the indefinite residue in the same proportions, adopting this course in lieu of bequeathing the whole at once in proportion to certain numbers. To this argument the court replied, that the most that could be said of it with any certainty was, "that this *may* have been his intention" that the claim was not corroborated by anything in the will or codicils unless it might be the unfriendly feeling exhibited by the testator towards James B., and that, on the other hand, the facts, that the bequests are, in form, separate, that the bequest of stock to James B. is conditional while the bequest of residuary stock is not; that the revocation names specifically the first bequest, and that it was improbable the testator would neglect to make any bequest to a brother, were particulars all of which were calculated to favor a different construction. The court added, that, it being settled that a second legacy will never be presumed to be a dependent legacy; but that, on the contrary, every legacy independent in its terms will be presumed to be independent, and to make it otherwise a clear intention must

364 appear on the face of the will, or will and codicil, it followed that the second legacy to James B. must be regarded as an independent legacy, and consequently not affected by the revocation. On the point taken, that the remedy was not in the superior court but was in the court of probate, the court said, that, by the allegations of the petition, that the time had arrived for the payment of the legacies; that they were payable by force of the will itself, and it required no action of the court of probate to give the legatees a right to recover them; that a suit would lie to recover the legacy; and that, the legacy being one of specific shares of stock, a suit in equity in the superior court would lie to enforce the transfer of the stock, and it would also lie for an accounting in regard to the dividends which had been received on the stock by the defendants in a fiduciary capacity.

It is true, that this decision on the demurrer, establishing the right of James B., did not directly decide against the right of children of Christopher. The clause in the original will, giving 500 shares in trust for the issue of James B., and the clauses in the second codicil revoking all legacies to or for the use of said issue, and giving to the children of Christopher a bequest, were not under direct consideration, or involved in the decision on the demurrer. But, the supreme court of errors having decided on the demurrer, in 32 Connecticut, that the residuum of stock was given independently by the will to the persons and parties to whom stock had before in the will been given, and, so, that a share in the residuum was given to James B., held, in 33 Connecticut, when called on to pass on the rights of the children of Christopher in the residuum, in respect of their 500 shares, the converse of the same proposition, and decided that it logically followed from their prior decision, that persons and parties to whom stock had not before in the will been given, could not take stock under the residuary clause, and, so, that a share in the residuum was not given to the children of Christoper, in respect of their 500 shares.

Acting on the view that the one decision may logically
365 follow from the other, while at the same time contending that the one decision does not logically follow from the other, the plaintiffs' counsel have, in argument, addressed themselves to undertaking to show that the decision of the Connecticut court in favor of the right of James B. was erroneous, with a view of getting rid of the effect of the construction which was put on the will and the first codicil in the decision on the demurrer. This they have done, assuming that it is open to the plaintiffs to have the question considered anew in this suit, as if it had never been raised in the former suit, because of the before mentioned alleged defects as to the parties in the former suit.

The view of the plaintiffs' counsel is, that the proper construction of the will and codicils is such, that if James B. can have no right to a share in the residuary stock, the children of Christopher must for the same reason have a right to a share in it in respect of the

bequest given to them in the second codicil. It is proper, therefore, to consider such right of James B., in the light of the views now urged. The arguments of counsel against the right of James B. are set forth in the report in 32 Connecticut. The leading counsel for the defendants was Mr. B. R. Curtis, of Boston. He urged, that, on the three papers taken as one testamentary act, the testator did not intend that the residuary stock should go to any persons were not prior legatees of stock; that he meant that a class of persons should have the residuum divided among them, that the exclusion of a person from the class excludes him from sharing in the residuum; that the revocation of legacies of stock by the codicils had the effect to make the revocations increase the residuum; that this increase was intended for the benefit of the specific prior legatees, in the proportions of their legacies; that, in view of the confirming clause at the end of the second codicil, the will was to be construed as if the original had been rewritten as altered, omitting the revoked parts and substituting new legacies in the place of old ones revoked; that it was to be read as if written at the date of the last codicil, and with all the revoked legacies omitted and the substituted legacies
366 inserted; that under that rule the will could no longer speak of James B. as a legatee of 500 shares, and if it could not speak of him as such legatee, it could not as a legatee under the residuary legacy, which gives the remaining stock to the prior legatees of stock; and that under the opposite construction, the 500 shares originally given to James B. fall into the residuum, and James B., in taking a share of such residuum, takes a part of the very 500 shares which the testator had declared he should not take. In such references to substituted legacies, the legacy of stock, in the second codicil, to the children of Christopher, would come under observation as a legacy substituted in the place of the legacy in the original will, of stock in trust for the issue of James B. The views urged by Mr. Curtis received the attention of the court, as appears by the decision.

The principal contention of the plaintiffs' counsel on this branch of the case is that the legacy of the proportional part of the residuum of stock to each legatee is united with each primary legacy of stock, so that the revocation of the primary legacy to James B. revoked also the legacy united with it, or accompanying it, of the proportional part of the residuum of stock. Stress is laid on these words in the will, "meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions," as having the effect, notwithstanding the prior words, "hereinbefore given," to cause every primary legacy of stock, whenever made, by the will or a codicil, especially in view of the confirming clause in the second codicil, to carry with it its ratable proportion of residuary stock. This is referred to as establishing a union binding up the two portions of the stock in one common disposition, and as

enabling the testator to revoke or increase or diminish a primary legacy of stock, and so effect a similar change in the residuary stock, without ever mentioning the residuary stock. This view of the proper construction of the will does not appear to be the proper one. The reasons assigned by the Connecticut court
367 for regarding the primary bequests and the residuary bequests as independent of each other and not united, seem to be unanswerable. If independent, the conclusion arrived at as to James B. was inevitable. The rules laid down by the Connecticut court as those which it followed were based on authorities cited by the counsel for James B., and which are found in the report in 32 Connecticut. One of the most pertinent cases is that of Roach *v.* Haynes, (6 Vesey, 153.) One Haynes, having a power of appointment under the will of one Franco, in respect to certain annuities, gave them and certain specific articles, by will, to trustees in trust for her residuary legatee, "hereinafter named." All her estate not thereinbefore disposed of she then gave to her son David. Afterwards, she made a codicil reciting that she had, by her will, given to her son William £1,000, and the residue of her estate to her son David, and certain other legacies, and revoking "all the above bequests," and giving the residue of her estate and effects to her sons William and David, equally between them, and giving certain pecuniary and specific legacies, and adding that, with these alterations, she confirmed her will, revoking all other codicils, and declaring that to be the only codicil to her said will. David claimed to be solely entitled. William claimed to be entitled jointly with David, and residuary legatees of Franco claimed the fund as undisposed of. The case came before Sir William Grant, master of the rolls. For David it was contended that although he was by the codicil deprived of the description of sole residuary legatee the codicil had no reference to the execution of the power of appointment, the fund not being given as a part of the residue, and that as the codicil was directed to operate as a revocation of distinct parts of the will it could not operate beyond that. For William it was urged that by the will the fund was united to the general personal estate, and the gift of the whole, fund and residue, to David by the will, showed an intention not to distinguish between the fund and the general personal estate, and that thus the revocation of the residuary bequest to David,
368 and the gift of the residue to the two, carried the fund to the two. For the residuary legatees under the will of Franco, it was contended that the codicil entirely revoked the residuary bequest in the will, and, in giving "the residue," gave only the residuary personal estate, and had no reference to the fund. The court held that the will separated from the residue the annuities and the specific articles, and vested them in trustees, and then gave the residue directly, and without the interposition of trustees, to David; that this was an appointment for the benefit of the person to whom she should give the residue, who turned out to be David; that, as the annuties and the specific articles had been separated from the residue,

the revocation of the residue did not extend to them, and did not affect the fund; that the claim of the residuary legatees of Franco must be rejected; and that David was solely entitled. The shares of stock in the present case, in the primary legacies, and in the residuary legacies, were the same kind of property, as is said in Colt *vs.* Colt, in 32 Connecticut, but so the general personal estate given as the residue in Roach *vs.* Haynes was the same kind of property, with the specific articles given to the trustees with the capital of the annuities. As Sir William Grant remarked, the revocation of the bequest of the residue did not extend to the specific articles, because the intention was manifest in the will not to include the specific articles in the residue, and if David was to have the specific articles, notwithstanding the codicil, he must also have the capital of the annuties, which the will had separated equally with the specific articles from the residue. In the present case the shares of stock given by the primary legacies were no part of the residuary stock, and the legacy of them was as distinct from the legacy of the residuary shares as if the residuary stock had been shares in a different corporation.

In Hall *vs.* Severne, (9 Simons, 515,) a will gave pecuniary individual legacies, and among them £100 to one Bannister.. It then directed his executors and trustees to divide the residue of his stocks and funds among "all and every the before mentioned indi-
369 vidual legatees" in the proportions that their several personal legacies "hereinbefore given and bequeathed to them" should bear to the amount of the residue. By a codicil, which he directed to be added to and taken as part of his will, he gave a legacy of £200 to the same Bannister, and pecuniary legacies to others who were legatees under the will, and declared that the legacies in the codicil were given to the legatees therein mentioned in addition to what he had given to them, or any of them, by his will. The question arose whether the legatees under the codicil were entitled to share in the residue with the legatees under the will. For Bannister it was contended that as the testator had directed that the codicil should be taken as a part of the will, the will was to be read as if it contained a gift of £300 to Bannister; and that, under the declaration in the codicil, that the legacies given by it were to be be in addition to those given by the will, the additional legacy to Bannister must partake of all the incidents of the prior one, and carry with it a share of the residue. The court (Sir Lancelot Shadwell, vice-chancellor,) held that under the will the persons who were to take the residue were the legatees named in the will; that the proportions in which they were to take it were the proportions which the legacies thereinbefore given to them respectively bore to the amount of the residue, and that under the codicil the legacy of £200 to Bannister was a substantive gift of £200, declared to be in addition to the gift of £100 in the will, but did not carry a further share of the residue in proportion to itself. The principle of this decision would lead to the conclusion that, even if the codicil had

revoked the legacy of £100 given to Bannister by the will, Bannister would have shared in the residue; and that it is a direct authority for holding that the substantive gift of stock to the children of Christopher in the second codicil does not carry a share of the residuary stock in proportion to itself.

In Wetmore *vs.* Parker, (52 N. Y., 450,) the testatrix, by her will, gave $10,000 to a church, complete its edifice, or pay any debt therefor, and, if not required for that purpose, then to be invested
370 and the income expended by the trustees of the church for its use and benefit. She also, by her will, gave to an academy $10,000, to erect its edifice, or pay any debt therefor, or, if the building should be completed and paid for before the bequest should take effect, then to be expended by the trustees of the academy for certain specified objects. The will bequeathed the residue of the "estate to the several persons, corporations, and societies to whom I have hereinbefore made bequests, and who shall be living and existing and able to take the same, in proportion to the amount given and bequeathed to them respectively." Afterwards she made a codicil, in which, after reciting the bequest to the academy, and that she had given $3,000 to it, "intending the same to be part of, and to be paid in anticipation of so much of said legacy," "therefore" she revoked the bequest of $3,000, part of the said sum of $10,000, and bequeathed to the academy "the sum of $7,000, instead of $10,000, to be expended by the trustees thereof for the purposes of, and in the manner prescribed in and by," the will. Afterwards she made another codicil, in which, after reciting that she had, by the will, given $10,000 to the church for the purpose principally in aiding and erecting its edifice and paying any debt that might be thereby incurred, and that it now appeared probable that said purpose would soon be accomplished, and that she had concluded to give, at that time, $3,000 towards extinguishing said debt, she revoked said bequest of $10,000 to said church. The court of appeals, in deciding the case, remarked that the bequests were all of money, and that, by virtue of the directions in the will, the whole property was to be deemed converted into personalty at the death of the testatrix. The court considered the question whether it was the intention of the testatrix, by the revocations, to deprive the church of all share in the residuary estate and to restrict the academy to the porportion of the residue represented by $7,000 instead of $10,000. It referred to the rules that, in ascertaining and carrying out the intention of the testator, as the primary object in construing wills, a codicil will not be allowed to operate as a revocation beyond the clear import of
371 its language; that an expressed intention to make an alteration in the will in one particular negatives, by implication, an intention to alter it in any other respect; and that the language employed must be scrutinized with care, not only in the particular parts, but in every part of the instrument, in order, as far as practicable, to ascertain the operation and intent of the mind using it.

The conclusion of the court was, that the two codicils did not operate to cut off or impair the right of the academy or of the church to share in the residue of the estate. It was held, as to the academy, that the two bequests were not dependent, although the reference to the first in the last designated the legatee and the amount; that the one legacy was for particular purposes, and the other for general purposes; that the legal effect of the will was to designate the academy as a residuary legatee for an amount made certain by mere arithmetical calculation, as effectually as if the name and amount were written out; that the testatrix paid $3,000 upon the specific legacy in her lifetime, and revoked $3,000 of it in language carefully confined to that alone; that, if she had intended to affect the other bequest, it must be presumed she would have said so; that the will and codicils bore evidence of particularity of expression as to every testamentary arrangement, and, within the rule referred to, the alteration of one bequest negatived an intention to alter the other; that if she had paid the whole $10,000 while she lived that would not tend to show an intent that the other should not take effect, but would evince a continued testamentary friendship; that the reasons for revocation applied only to the specific legacies, showing that the testatrix regarded the two as independent; and that the right of the church to the residuary legacy was substantially the same as that of the academy, and for the same reasons. The court considered the argument that the will and the codicils must be construed together, speaking only from the death of the testatrix, and that, therefore, the whole will should be construed, for all purposes, as though the bequest to the church was not in the will at all, and that to the academy was
372 $7,000 at the time the will was made. It is said that that proposition, as a whole, could not be sustained, being in conflict with the rule that it must be ascertained, from all the testator has said, what he intended; that a will is to speak from its date, when a fair construction of its language indicates such intention; that a reference to an actually existing state of things in a will refers to the date of the will; that this rule is applicable to both property bequeathed and to legatees entitled to take; that the general rule is, that, if a bequest is made to one sustaining a particular relation, and there is such a person in being at the date of the will, it is descriptive of that person; that, whatever exceptions there are to the rule, the rule and exceptions are established to reach the intent of the testator; that the revoked legacies, though out of the will as legacies, may be referred to if they throw light upon other portions of the will; that when the testatrix said, in the residuary clause, "I give to the persons to whom I have *hereinbefore* made bequests," she referred to an existing description, and the court must adopt the same description; that "hereinbefore" means "in this will as it *now* exists;" that the language of the will and codicils, the circumstances developed, and the rules of law concurred in not permitting the conclusion that the testatrix intended that her

residuary estate should go to those only who had unpaid or unrevoked specific bequests at her death; and that no such intimation was contained either in the will or the codicils, nor had any reason been suggested for such an intention. The court then cited the case of Colt *vs.* Colt, in 32 Connecticut, as deciding the precise question in accordance with the views it had so expressed, and in a case not as favorable to the legatee, having less elements of independence in the legacies, and having a change of friendly relations between the testator and the legatee stated in the revoking codicil. The court then referred to the case of Hayes *vs.* Hayes, (21 N. J. Chy. Rep., 265,) which is cited by the plaintiffs here, and distinguished it. The will made bequests to various persons. In the residuary clause it was stated that the specific bequests amounted to $70,000,
373 and that if the estate amounted to more or less than that sum they were to be increased or diminished in proportion so as to absorb the whole estate. In the codicil the testator revoked, partially and entirely, bequests to the amount of $7,000, and directed that this sum should be apportioned among certain remaining legatees. It was held that the residue must be divided among the legatees in proportion to the amount to each, after the addition or deduction of the $7,000 according to the terms of the codicil. This was upon the ground that the specific and residuary legacies constituted but one legacy to each legatee and were dependent.

The fact that the bequest of stock in this case to the executors was made to "my executors hereinafter appointed," and that when the first codicil revoked the appointment of Deming as executor and appointed Jarvis in his place, still, although, there was no provision directly giving to Jarvis the legacies of primary and residuary stock, it was held that he was entitled to them and Deming was not, is referred to by the plaintiffs as showing that such legacies passed to Jarvis because the word "hereinafter" referred to the will and codicils combined, and that a similar construction should be given to the word "hereinbefore." But the court put its decision not on that ground, but on the ground that the bequest to the executors was to them as parties and as "hereinafter" appointed, and not as persons, and was compensatory and intended for those who should perform the trust.

The plaintiffs also refer to the fact that the original will gave 25 shares of the stock to Alden on certain conditions, and the first codicil gave him 50 shares of it in lieu of the 25 shares on the same conditions, and they contend that the testator intended he should share in the residuary stock in proportion to the 50 shares. But this is begging the question; and the views above laid down show that Alden could have shared in the residuary stock only in respect to the 25 shares.

The plaintiffs also refer to the revocation in the first codicil of "the legacy" given by the original will to the oldest
374 son of Christopher, and say that the original will contained two legacies in respect to him, primary and residuary, yet

both legacies must be regarded as having been revoked, and this could be only on the view that "the legacy" was mentioned as the primary legacy and as the representative of the whole, so that revoking the primary legacy revoked the gift of its corresponding residuary stock. There is nothing in the reasoning in Colt *vs.* Colt, which would justify the conclusion that the revocation could operate only on the primary legacy to the oldest son of Christopher. "The legacy" may well mean all that is given as a legacy, or by way of legacy, whether primary stock or residuary stock. But that is very different from revoking a legacy of 500 shares, or of any other specific number of shares. The same remarks apply to the revocation, in the second codicil, of "the legacy" given "by said original will and codicil" to trustees for founding the school. In that case there were legacies to such trustees by the original will of primary and residuary stock, and a legacy of primary stock to such trustees by the first codicil, yet in the second codicil all these legacies are grouped together, in the revocation, as "the legacy" and as "said bequests."

Much stress is laid by the plaintiffs on the facts that the revocation in respect to James B. is because of "his late unbrotherly conduct;" that the children of James B. are cut off by the second codicil, which, it is alleged, shows further alienation from James B.; and that the revocation of the primary bequests for the school threw 3,000 shares of stock into the residuum and left that quantity and its proportion of residuary stock to be divided among the other legatees, largely increasing the amount of each of the other residuary legacies. From this it is urged that it cannot be supposed the testator intended, while cutting off the primary legacy of stock to James B. and all the legacies to his children, to leave to James B. more than 574 shares of the residuum while taking from him a primary legacy of only 500 shares, and thus give him a
375 part of the very stock he was taking away. The complete answer to these suggestions is, that, after the testator had by the will given a specific legacy of stock to James B. for life, remainder to his issue, and a specific legacy of other stock to trustees for said issue, and had made a residuary clause, such that James B. and his issue on the one legacy, and the trustees for his issue on the other legacy, would share in the residuary stock in proportion to such legacies, he, with these things fully before his mind, revokes, in the first codicil the legacy of 500 shares, "given in the aforesaid will to James B. Colt for life, remainder to his children," and does not revoke any share of James B. in the residuary stock, and afterwards, in the second codicil, which refers to the first codicil and its contents, gives to each child of James B. $100, and revokes "any and all other legacies or devises by me heretofore at any time made to or for the use and benefit" of the children of James B., or any of them, and does not revoke all or any legacies theretofore at any time made to James B.

It is further urged by the plaintiffs, that, as there was a division

of some of the stock made by the will and the codicils, in specific legacies, to precede a second division of the residue of the stock to be made by the executors in the future, the word "hereinbefore" should be divided into two words, "herein" and "before," and "herein" should be held to apply to all legacies which precede the distribution to be made of the residue, whether such legacies are found in the will or in a codicil, so as to make the residuary clause read, that the remaining stock shall be divided among the several persons and parties "to whom I have herein," that is, in the will and codicils, "before," that is, in the first division effected by the primary legacies in the will and codicils, "given legacies of stock, in the ratio and proportion in which said legacies of stock are herein," that is, in the will and codicils, "before given," that is, in the primary division effected by the will and codicils, which division precedes the division to be made of the residue, meaning that
376 "my residuary estate in said stock shall be shared by the same persons to whom I have," that is, in the will and codicils, "given specified legacies in stock, and precisely the same ratable proportions." This view is ingenious, but very unsound. It wrests the plain and straightforward meaning of the word "hereinbefore;" and substitutes for it a fanciful division of the word into two words, to each of which is attributed a fanciful meaning not in accordance with any ordinary meaning, and having no basis except an inspiration from the result sought.

We come now to consider the bequest in the original will to trustees for the issue of James B., and the provisions of the second codicil as to the children of James B., and as to the children of Christopher. In so far as the views before announced in regard to to the right of James B. to share in the residuary stock lead to the conclusion that he had such right, they also lead to the conclusion that the children of Christopher have no such right in respect of their primary legacy of 500 shares. That conclusion follows logically from the conclusion in regard to James B., as was said by the court in 33 Connecticut.

But the plaintiffs present another view, which they claim was not considered in Colt *vs.* Colt. They contend, that, without regard to what construction is put on the will and codicils, in respect to the questions actually considered in Colt *vs.* Colt, the second codicil does not work a revocation of the legacy of 500 shares given to the executors in trust by the will, with a trust for the issue of James B., but merely effects a substitution of the children of Christopher as *cestuis que trust* in place of the children of James B., the gift of the stock to the executors in trust remaining undisturbed. It is contended that the Connecticut court left out of view the consideration that the gift by the will of the legal title in the 500 shares to the trustees was not revoked; that the will gave the stock, the legal title, to the trustees; that all it gave to the children of James B. was the use and benefit of the stock; that such use and benefit was withdrawn by the second codicil;

377 and that the language of the gift to the children of Christopher in place of the children of James B. is such as to make the case one of a substitution of the former for the latter, and so one where the interest given to the latter by the will in the residuary stock was transferred by substitution, by the second codicil, to the former. The bequest in the original will was not to the children of James B., but was to the "executors and their successors in said office," in trust for the issue of James B., the issue to have the stock when the youngest survivor should have reached the age of twenty-one years. By the second codicil, in the first place a legacy of $100 is given to each of the children of James B., and then the codicil cancels and wholly revokes "any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children or any of them." This disposes of the legacy. It is taken away from the executors as trustees of it for any purpose, because the only purpose of it was for the use of the children of James B., and as a legacy for their use it is revoked. It is not merely the use or benefit that is revoked, leaving the legacy to stand with a substituted use. The codicil next takes up the subject of the children of Christopher, and, after giving a legacy of $100 to the oldest son, and revoking all legacies before made in his favor, it proceeds: "and I hereby give, bequeath, and devise to the other children of my said brother (said oldest son not being included herein) the property, to wit, 500 shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children, in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt." Here the legacy in respect to the children of James B. is referred to, first, as a
378 legacy to the executors in trust for the use of said children, and then is referred to as a bequest to the children. It was clearly a bequest to the executors in trust for the children; but the form of words in the codicil shows that the testator drew no distinction between a legacy to a person and a legacy to his use. So the bequest to the children of Christopher is, first, a bequest to them to have and to hold to them, and then is declared to be in trust for them in the executors, on the same terms as provided in the original will in respect to the children of James B. Here, again, is no distiction between a legacy to a person and a legacy to his use. But the sum of all this is, that the legacy is to the executors in trust. Still, it is as distinct a legacy from the legacy to the executors in trust for the children of James B. as that legacy was distinct from the devise of land to the executors in trust for the children of the testator, and from the bequest to the executors in trust for the

school. The fact that the 500 shares covered by it are declared by the second codicil to be the 500 shares which had been given in trust for the children of James B., and the legacy of which had been before revoked in the same codicil, cannot make it a substituted legacy of such a character as to give to the children of Christopher the same right to share in the residuary stock, in respect of it, which the children of James B. would have had in respect of the 500 shares given in trust for them by the original will. The reason for this conclusion is, that the codicil revokes all the legacies to or for the use of the children of James B., the two legacies of stock, the primary and the residuary, and then it does not give both of them to the children of Christopher, but only gives one of them, to wit, 500 shares. That was the primary legacy in the original will. No other legacy of 500 shares was given to the children of James B. in the original will. The legacy to them in the residuary stock was not one of 500 shares. The case is no different from what it would have been if the original will had given two specific legacies of stock to the children of James B., one of 500 shares and one of 400
379 shares, and both had been revoked, and then the one of 500 given to the children of Christopher, without mentioning the other. They would not have been entitled to the other. As the codicil had just revoked all the legacies to or for the use of the children of James B., one of which was a legacy in the residuary stock, it was obvious and easy to have given a legacy of all the same stock to the children of Christopher, and not to have limited the legacy to 500 shares in terms, if it had been intended to extend it beyond 500 shares. The subject must have been in the mind of the testator, in having just revoked all legacies to the children of James B., yet, when he saw that there was thus residuary stock revoked to the extent of more than the primary 500 shares, which would go into the residuum again, and, if not given to the children of Christopher, would go to the other persons entitled to share in it, he refrains from mentioning it, and limits the bequest to the children of Christopher industriously to 500 shares. There was nothing singular in augmenting the residuum of stock. The same codicil had just augmented it by the 3,000 shares previously devoted to the school trust, and by 25 shares before given to the oldest son of Christopher, the first codicil having also augmented it.

It is further contended for the plaintiffs, that the bequest, in the second codicil, to the children of Christopher is of all the property given by the original will to the executors in trust for the children of James B., that the words "the property, to wit, five hundred shares," &c., "which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt," must be read as if they were "the property which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to wit, five hundred shares," &c.; that, in such case, the bequest would carry the property, all of it, primary and residuary stock, because that and nothing less

is the property which the original will bequeathed, and the words following the words "to wit" would be rejected as
380 false description, and that, if the codicil does not give the residuary stock, it does not give "the property." It is by no means clear that, in the present case, if the language were in the form so suggested, it would carry the residuary stock, because there was a specific legacy of 500 shares given by the original will to trustees for the children of James B., and there was also a distinct legacy of residuary stock to such trustees, and the reference in the codicil to the legacy of 500 shares was not a false description. But, aside from this, the two distinct legacies existing, and one of them being of 500 shares, and properly so described, and in all respects otherwise properly recited, the gift of the subject of one of them as 500 shares must be held to control the words, "the property, to wit." The case is not one where the testator had given, say, a legacy of 600 shares and then referred to it as 500. Here were two distinct legacies, and his reference to 500 shares was needless surplusage, if he meant to give all the shares, primary and residuary, he necessarily having both before his mind. The criticism that the language is "the property which is, and not "the 500 shares which are," has been observed, but is not considered of any weight. The words, "the property, to wit," are equivalent to no more than the words, "the property consisting of 500 shares," &c., "which is," &c. This means no more than "the 500 shares," although the grammar of the sentence makes "is" proper.

As has already been shown, it is a mistake to say that the original gift of the 500 shares to the executors in trust is not revoked, and that, therefore, they are "hereinbefore named" in the will, as respects the children of Christopher, in reference to the residuary stock. The second codicil does revoke the gift of the will to the executors in trust for one purpose, and does give to the executors, in trust for another purpose, a new gift of the 500 shares.

The case of Lord Carrington *vs.* Payne, (5 Vesey, 404,) so much relied on by the plaintiffs, has no application to the facts of
381 this case, even if it be regarded as good authority for any case. The case was decided in May, 1800, by Sir Richard Pepper Arden, the master of the rolls, who, in May, 1801, became Lord Alvanley. One Payne, by his will, devised real estate to trustees and their heirs upon trust to convey upon certain trusts, and subject thereto to several natural sons successfully in strict settlement, and then directed that the residue of his personal estate should be laid out in land, and that the estates so to be purchased should from time to time be settled to such uses, upon such trusts, and in such and the like manner, as I have hereinbefore directed respecting my real estates." He appointed the trustees named to be the executors. Afterwards he made a codicil, which he recited that he had by his will directed his trustees to convey, settle, and assure certain real estate, and in the settlement directed to be made of "my said estates," had directed that they should be limited in a

certain specified manner, and then revoked so much of the will as directed the settlement, and "instead thereof" directed "that in and by the settlement to be made of said estate as aforesaid the same estates be limited" in a manner specified. The change made in the limitation was to vary the order among the sons and postpone William, an elder one, to younger ones. The question arose with respect to the fund directed to be laid out in real estate, whether the codicil postponing William to his younger brothers extended to that fund. The master of the rolls held that the real and personal estates were united by the will and made into one settlement by which the persons named were to take in the course of succession marked out. It was contended in that case that the codicil revoked the devise so far as respected the real estates of which the testator was seized at his death, and made new limitations, but left the estates to be purchased with the personal estates, to go to the same persons, and in the same order, directed by the will in regard to the real estate given thereby. On this subject the court said: "It was said that when one species of property is devised in a particular manner, and in the same will another species of property is declared to be annexed to it, as it was in the case of
382 Darley *vs.* Langworthy, (Amb., 653,) or where it is given to the same persons as the other estates, and by act of law or by codicil the disposition of the former is revoked or altered, the latter shall not be revoked or altered unless it is manifest the testator intended to affect that. I am willing, for the sake of argument, to admit this; but it does not in any way affect this case. I admit the testator does not, by these words, include the lands to be purchased; and if, by the will, he had given to certain persons the lands he was seized of, and had by that will directed his personal estate to be laid out in land for the benefit of the same persons to whom the real estate was devised, and, by a codicil, he had given the estates of which he was seized to different persons, and in a different manner, and had used no words applicable to the personal estate, the codicil might, upon those two cases, have the effect of disuniting them, and the personal estate would have gone to the same persons as if the codicil had never been made. That is the effect of Lord Sidney Beauclerk *vs.* Mead, (2 Atk., 167.) It was argued that the codicil in this case does not include the personal property to be laid out in land, and then, considering the codicil as a revocation of the devise of the real estate, as it is silent with respect to the personal estate, that must, upon the authority of those two cases, go exactly as if that codicil had not been executed. But none of these arguments apply to this case, for this codicil does not revoke the devise of the real estate. It leaves the devise of the real estate to the trustees in full force. It does not in any degree disunite the estates to be purchased from the settlement to be made of the real estate. It is, therefore, fallacious to argue that it was a revocation of the devise of the real estate at all. It remains devised to the trustees, and the only alteration is in the mode of

succession to be directed in the settlement to be made. The will directed a settlement to certain uses, and gave the personal estate to be laid out in land, to be settled to the same uses. * * * The will is not revoked as to the union of the two species of estates.
383 The codicil makes no alteration with regard to that union, and though the testator makes use of the work "revoke," the will is not a revocation as to that union, but merely an alteration of the order of the limitations to be inserted in the settlement; and it is no more than if the devisor with his own hand had inserted the names of George and John before William, and then republished his will. The codicil leaves the will in full force with regard to everything not expressly, or by necessary implication revoked or altered; and I am clearly of opinion that the settlement, as far as respected the union of the estates, remained in full force. In 1 Jarman on Wills (with Am. notes, ed. 1880, p. 348), that case seems to be looked on as of doubtful authority. But the language of the court in that case as quoted, seems to anticipate and except a case like the one at bar. The mistake in supposing that case to be like this one is the fundamental one of regarding this case as one of the non-revocation of the bequest to the executors, and a mere change of the beneficiaries of the trust. There is in this case a distinct revocation of the legacy to the trustees, while in that case the revocation was only of the direction as to the settlement and limitations.

But it may well be said that, for the purposes of the question in issue, the bequest in the will of the 500 shares was one to the children of James B., for the trust was to cease and they were to have the shares as an absolute estate; and the trust for the children of Christopher was to cease, and they were to have the 500 shares as an absolute estate. Whether a legacy to the trustees or to the children of James B., the second codicil absolutely revoked it. The mere fact that the same shares were afterwards given to the same trustees, on like trusts for other persons, is not sufficient to make the transaction a mere substitution.

The case of *In re* Gibson's Trusts, (2 Johnson & Hemming, 656,) in 1861, before Vice-Chancellor Sir W. Page Wood, afterwards Lord Hatherly, and Lord Chancellor, and a very eminent authority, was very like the present case. Gibson, by his
384 will, gave several pecuniary legacies, including one of £500 to his sister, Mary Birkett. The will then said, "and all the residue of my personal estate whatsoever I give and bequeath to all the before mentioned pecuniary legatees," excepting certain ones, but not excepting Mary, "and to be divided among them in proportion to their respective pecuniary legacies." Mary died after the will was made, and the testator then made a codicil, reciting her death and giving the sum of £500 to John Birkett, in trust, to pay the same to such of the children of Mary as should attain the age of twenty-one years, and as they should severally attain that age, and, if more than one, in equal shares. The executors paid

the £500 to John Birkett. Of the residue of the personal estate, some £365 would appertain to the £500 legacy, and the question arose whether John Birkett or the surviving pecuniary legatees under the original will were entitled to that money, or whether there was an intestacy in regard to it. The court held, in the first place, that the residuary legacy was not to a class, but to individuals, and that, therefore, the survivors of the pecuniary legatees in the will were not entitled to the money. The counsel for John Birkett relied on the decision in Lord Carrington *vs.* Payne, and his arguments were the same as those of the plaintiff's counsel in this case, and it was strongly pressed that the testator intended that the children of Mary should have all that she would have had under the will, and that the court would not hold that there was intestacy. It was urged that the effect of the codicil was the same as if the name of John Birkett had been substituted for that of Mary in the bequest in the will. The court says: "The testator being aware of the death of Mary Birkett, and having in consequence given the £500 to John Birkett upon trust for the children of Mary Birkett, does not go on to say a word as to the share of the residue which had also been given to Mary Birkett, not (as I have already held) as one of a class, but as an individual *nominatim*. Mr. Kay ingeniously argued the case as if it were governed by the authority of
385 Lord Carrington *vs.* Payne. But the decision in that case turned upon special circumstances, and Lord Alvanley expressly guarded himself against deciding a point very like that which I have now to determine." The court then reviews the facts and the decision in Lord Carrington *vs.* Payne, and quotes from the decision the foregoing remark of Lord Alvanley, and says that the hypothetical case put by him is exactly the case of Gibson's will; and that the case of Lord Sidney Beauclerk *vs.* Mead is very similar to the hypothetical case put by Lord Alvanley, and to the Gibson case. In Lord Sidney Beauclerk *vs.* Mead, the testator devised his freehold lands to Reeve for life, with remainder over; and directed the surplus of his personal estate to be laid out in the purchase of lands, to be settled to the same uses as his freehold lands. By a codicil he directed certain lands so given by the will to Reeve for life, to be equally divided between Reeve and Beauclerk during their joint lives. After the death of Reeve, Beauclerk sought to recover one-half of the interest and profits of the surplus of the personal estate which had accrued during the life of Reeve. Lord Hardwick held that neither on the language of the codicil, nor on the presumed intention of the testator, could there be any ground for holding that the codicil affected the disposition in the will of the surplus of the personal estate. Recurring to the Gibson case, Mr. Kay, for John Birkett, cited Johnstone *vs.* The Earl of Harrowby, (7 DeGex, F. & J., 183), and other cases, as showing that substituted legacies are subject to the same conditions, and carry with them the same incidents as those for which they are substituted. On this point the court said: "I am not aware that the

rule which those cases establish has ever been extended to that length; and it was decided in LeMore's Trust, (10 Hare, 171, 176,) by Lord Justice Turner, when Vice-Chancellor, that it cannot be applied to a case where, as here, its application would alter the limitations of the property." On the contention that the court would not allow intestacy, as here it is urged that the court will not allow the residuary stock
386 to go elsewhere than with the primary, the observations made by the vice-chancellor are pertinent to this case. He says: "Though the court presumes that a testator did not intend to die intestate, it may be driven to the conclusion that he has done so, in spite of the presumed intention to the contrary. In the present case I am driven to that conclusion. In making the codicil in question, the testator had his will present to his mind. He had before him not only the legacies bequeathed by his will to the several pecuniary legatees *nominatim*, but also the legacies in his will, to the same legatees, of his residuary personal estate. Yet, in the codicil he refers exclusively to the pecuniary legacies, and takes no notice of the residue. Under such circumstances, I cannot hold that the codicil had the effect of passing to the legatee under the codicil not only the legacy given to him by the codicil, but also a share of the residue, as to which it is totally silent."

In Bridges *vs.* Strachan, (L. R., 8 Ch. Div., 558,) in 1878, before Vice-Chancellor Malins, one Page, by his will, gave certain freehold lands in Dorset to trustees, to the use of his daughter Elizabeth for life, with the remainder over. He also gave to the trustees £3,000, in trust, to lay out the same in the purchase of lands in Dorset, and to settle the estates so to be purchased to the same uses as were declared by his will concerning his lands in Dorset. By a codicil he revoked the devise of the freehold lands in Dorset, and in lieu thereof gave the same to the use of his trustees, until the oldest son of said Elizabeth should attain the age of twenty-one years, with remainder over to the use of other persons than said Elizabeth. The question arose, whether, the devise of the Dorset estates having been revoked by the codicil, the gift of the £3,000 to be laid out in the purchase of lands in Dorset to be held on the same trust, was revoked by implication. The court said: "It may be that the testator intended to revoke the latter gift of £3,000, and I think, in all probability, his object was
387 to extend the Dorsetshire estate, but he has omitted any reference to the £3,000 in his codicil. Therefore, on principle, there is no implied revocation. I think that, notwithstanding the case of Lord Carrington *vs.* Payne, no revocation takes place unless a clear intention is expressed. Darley *vs.* Langworthy, (3 Bro. P. C., 359,) supports that view, and the case of Francis *vs.* Collier, (4 Russ., 331,) is in conformity with that principle. I think, therefore, that the rights of the parties are the same with regard to the £3,000 as if the codicil had never been made, and that Elizabeth Strachan is entitled for life under the bequest in the will." That

case is directly in point in support of the decision made on the demurrer in Colt *vs.* Colt, and against the positions of the plaintiffs in this case.

The question of the proper construction of the will and codicils in reference to the points raised in Colt *vs.* Colt and those now raised, has been considered very much at length and with great care, and in reference to all the views urged for the plaintiffs, because of the large amount involved, and of the thoroughness and ability with which the case was presented by the counsel for the plaintiffs, and of the fact that the decision of the highest judicial tribunal of the State of Connecticut, in 33 Connecticut, was impugned as rendered without much consideration and without a full and fair hearing of the matter in question. The result is, that, on principle and authority, the claim of the plaintiffs must, on the merits, be rejected.

But, even if it were otherwise, the Connecticut suit is set up as a bar to the present one. To this the plaintiffs reply, that the Connecticut suit was one against the three executors, as such, and certain legatees; that the present suit is one against the three executors as trustees, and asks for an account, the other legatees and the executors, as such, being added as defendants; that the defendants, Colt, Hubbard, and Jarvis, had three capacities: (1,) executors, (2,) a personal interest each as a legatee, (3,) trustees of the children of Christopher; that they were
388 parties to the Connecticut suit only in the first two of these capacities; that only in their capacity as trustees could they receive the trust property from the estate; that there was no decree against them as trustees, and, as trustees, they are not bound by thetdecree; that, because they were not parties as trustees, they are no responsible as trustees to the plaintiffs for their conduct in the case; that they denied, in the Connecticut case, the title of their *cestuis que trust;* that they defended only as executors; that they aver in their answer in this suit, that, as executors, "they did not appear or act particularly as trustees for or on behalf of the plaintiffs;" that as executors and as trustees they are different parties, though the same persons, and are to be regarded as if the executors and the trustees were different persons; that they did not appear in the Connecticut suit in the same right in which they are sued in this suit; that they had no right to speak as trustees in that suit, any more than if other persons had been trustees; that their rights as trustees could not be adjudicated in that suit without their first being made parties to it as trustees; that they ought to have set up in that case, that as trustees they were not parties to it; and that the question passed on in 33 Connecticut was not whether the trustees took a share in the residuum in respect to the 500 shares, but whether the children of Christopher took a share. In addition to this, the plaintiffs call attention to the brief put in in the Connecticut suit, by the counsel for the executors, on the hearing of the case in 33 Connecticut. That brief contended that James B.

took only a life estate in his share of the residuary stock, it having been decided, on the demurrer, that he had a share; that the stock, primary and residuary, given to the two children who died before the testator, was to be disposed of as though there was no will; and that Jarvis took a legacy of stock and Deming did not. These were questions one, three, and five, and were decided in accordance with the views of the brief. The remaining point considered in the brief, question four, was as to the children of Christopher. The brief urged that those children were not entitled to share in the
389 residuum of stock in respect to the 500 shares, (1) because the residuary clause excluded them by using the word "hereinbefore," citing Hall *vs.* Severne, and (2) because there was nothing in the second codicil which expressly, or by implication, gave a share to them in the residuum. These views were sustained by the court. The opposite views were presented by Mr. Henry C. Robinson, claiming to represent the children, as stated in 33 Connecticut, and as appears by the proofs. He argued the case orally in the interests of said children and filed a brief. He maintained the right of the children to share in the residuary stock in respect of the 500 shares, and urged that even under the word "hereinbefore" the primary legacy to the trustees remained, with a mere change of beneficiaries. He cited five of the cases now cited by the plaintiffs, including Lord Carrington *vs.* Payne, and cases not now cited, as appears by the minutes of argument taken by the reporter of the court.

The objection that the executors were not made parties as trustees seems to be very technical and entirely without merit. The will and codicils were before the court, with the fact that the children of Christopher were also before it by themselves, and by the guardian of those of them who were minors, and that all the defendants in the suit were brought in as having or claiming an interest, either "legal or beneficial," as the petition said, in the residuary stock, and as being the parties whose rights it was necessary to ascertain and fix in such a manner as to bind those claiming an interest in such stock. If the legal interest in the 500 shares was not in the children, it was in the executors. The fact that it was in the executors in trust did not make it any the less in the executors. It was in the executors, as such, in trust. All testamentary property, the title to which is in executors, is in them in trust. The three trustees being parties as executors were really parties as trustees. The answer does not say that as executors they did not represent the trust for the plaintiffs. It says that, being cited to appear as executors, and ap-
390 pearing as executors, they did not appear or act "particularly as trustees for, or on behalf of, the plaintiffs, because the plaintiffs were duly made parties to the proceeding by themselves and by their guardian, and appeared therein by able counsel and were fully heard." The trust was given to them as executors, and as being executors, and so, when they were made parties as ex-

ecutors, they became parties as representing the trust and its subject matter and its beneficiaries. One of the contentions of the plaintiffs is, that, when the same person is by a will appointed executor and trustee, his probate of the will is an acceptance of the trust, and by becoming executor he becomes trustee. This being so, when the executors were made parties as executors, that was all that was necessary. The second codicil directed that the executors, as executors, should hold the stock in trust for the children of Christopher, and, when the suit was brought against them as executors, their *cestuis que trust* also being parties, and the subject of the suit involved the rights of the trust and of the beneficiaries *nominatim*, it is only technical criticism to insist that they should have been cited as trustees as well as executors.

The executors, by their counsel, Mr. McFarland and Mr. Curtis, on the argument of the demurrer, presented the case in favor of these plaintiffs, by resisting fully and thoroughly the claims of James B. When that was decided in favor of James B., the decision against the claim of the children of Christopher followed logically, as the court said in 33 Connecticut. They had a large interest in resisting the claim of James B., and the principle of that claim, and in maintaining the construction of the will and codicils urged by the executors in opposition to the claim of James B. If James B. were to be defeated, they could expect to share in the residuary stock, in respect of their 500 shares, but not if James B. shoud succeed.

391 In opposing James B., the executors were maintaining the claim of the plaintiffs. The evidence of Mr. Hubbard shows that Mrs. Theodora G. Colt, the mother of the children of Christopher, and the guardian of the three minors, was warned by him that a decision in favor of James B. would be damaging to the interests of her children, and endeavored in vain to induce her to oppose the claim of James B. He also says that after the decision on the demurrer, he saw Mrs. Colt and "explained to her the situation," and told her that there might be serious damage to the interests of her children, and asked her what course she desired should be taken to protect their rights; that she said Mr. Henry C. Robinson was the counsel for herself and children, and would act for them as their independent counsel for the maintenance of their rights, and that Mr. Robinson did act in the matter of the findings made by the superior court preparatory to the reservation of the six questions for the supreme court of errors, and also in the argument of the questions for the children in that court. Mrs. Colt admits that before the argument of the demurrer, Mr. Hubbard asked her if she did not intend, on behalf of her minor children, to oppose the claim of James B., and she said she did not, because the interests of her children were identical with those of the other legatees, and the interests of her children would be sufficiently protected by the opposition which the executors intended to make to the claim of James B. She says that he said that her opposing it personally would strengthen the case against James B., and that her children's

interests were involved in the suit; that she said "how?" and he said "by decreasing the general residuum;" that she declined to oppose the claim of James B., personally, and that Mr. Hubbard never hinted to her "that her children's interests were further endangered, or that there was any possibility of their being endangered in any way that they would not be protected by the executors and trustees." It is not important to determine whether the recollec-
392 tion of Mr. Hubbard, or of Mrs. Colt, is the more accurate as to what transpired, after the lapse of fifteen years. It is not probable that any party or counsel comprehended fully in advance the scope of the decision in favor of James B., as it appeared afterwards. His claim was looked upon not only as untenable, but as foolish, wild, and crazy, and so, what all the effects of his success might be, were not likely to be fully appreciated beforehand. But, however this may be, the executors faithfully maintained the interests of the children of Christopher by faithfully opposing the claim of James B. As to the conversation with Mrs. Colt after the decision of the demurrer, as testified to by Mrs. Hubbard, Mrs. Colt denies having any conversation with Mr. Hubbard after the decision on the demurrer, in relation to her taking any action to protect the rights of her children, and denies specifically what Mr. Hubbard testified to on that subject, as before recited. She also denies that she ever employed Mr. Robinson as counsel, although she admits that she was informed by her son Edward before he died, which was in October, 1868, that Mr. Robinson had appeared and argued for herself and her children in the James B. Colt suit. Mr. Robinson testifies that he was retained by Edward for the interests of the minor children of Christopher (Edward D., LeBaron B., and Samuel P.;) and that he entered an appearance for them in the suit just before the demurrer was argued in the superior court. Mr. Hubbard says, that, having been informed that Mr. Robinson was the counsel for Mrs. Colt and her children in respect to their interest under the will, he applied to Mr. Robinson to act in their behalf in the argument of the demurrer; and that Mr. Robinson said that he was their counsel, but was not authorized to oppose the claim of James B. Mr. Robinson testifies, that Mr. McFarland, the counsel for the executors, expressed to him the opinion that the children of Christopher had an interest in the suit larger than their share in James B.'s interest in the residuary stock, and that the amount coming to them under the codicil was very likely to be unfavorably affected
393 by the overruling of the demurrer; and that he communicated this to Edward D., who refused to allow him to act for the minors against James B. Mr. Robinson also testifies distinctly to the ratification to him personally by Mrs. Colt of his employment for her minor children, in the James B. suit. Mrs. Colt as distinctly denies that she ever employed Mr. Robinson, or caused him to be employed in behalf of her children or herself, in the James B. suit. The plaintiffs contend that all that is shown is, that Edward D., who became of age in May, 1865, shortly after the decision of the

demurrer, retained Mr. Robinson in February, 1864, for himself alone; and that Mr. Robinson went on under a mistake, supposing that he was to appear for all the minors and for their guardian, while she, and all but Edward, regarded him only as counsel for Edward. The weight of the evidence is largely that Mr. Robinson appeared for the minors and for their guardian, by the authority of the guardian. He presented what were the merits of their case faithfully. The real decision against them was made when the decision was made in favor of James B. What followed was a "logical necessity," as Mr. Hubbard said in his letter to Mrs. Colt of May 11th, 1866. The executors fully defended the interests of the children against the claim of James B. They say in their answer in this suit that they employed counsel to appear in the cause and present for the consideration of the court such questions regarding the construction of the will as should appear to them well founded in the law, and that that was done by counsel. The counsel, Mr. Mr. MacFarland and Mr. O. S. Seymour, saw that the court must come to the conclusion it reached, notwithstanding the positions taken by Mr. Robinson. The executors represented all parties interested in the stock, and did not hold any stock any more in trust for the plaintiffs than for any other legatee, so far as regarded their duty as executors summoned in the suit, to present to the court views well founded in the law, and just and right in respect of all the
394 legatees interested, in regard to the construction of the will and codicils, and the distribution of the residuary stock. The views they presented prevailed, not because they presented them, but in spite of Mr. Robinson's argument, and of the argument for the executors on the demurrer on the other side, and there is no ground for the suggestion that if those views, which sustained the claims of the other legatees against those of the children of Christoper, had been presented by those other legatees through some counsel who were not counsel for the executors, the result would have been different. The executors represented all the legatees, and were entitled, and it was their duty, to present to the court what they regarded as the true view of the law as to all the legatees. It was open to any legatee to present different views. The executors themselves were legatees, individually interested in the residuary stock, and in increasing it by what these plaintiffs claimed. This is made a ground of impeachment of their action. But they were interested as executors and as individuals, and were summoned in both capacities, and could not divest themselves of their individual interest, or of their interest as representing those who had an adverse interest to the plaintiffs, and were not called upon to assume a position hostile to their own individual interests, or to the interest of all except these plaintiffs. There was nothing deserving of animadversion or out of the way, legally or morally, in what they did. They violated no duty and committed no fraud. They took care that the minors and the guardian should be represented by special counsel. Isabella was of age, and was served

with process. The only answer appearing on file in the case is an answer purporting to be the answer of "the respondents," by Hubbard & MacFarland, attorneys. It merely says, that the respondents deny the truth of the allegations "in the petitioners' bill of complaint contained, and thereof put themselves on the court for trial." The answer bears date as of December term, 1865, but this must be taken to be an error, as the
395 order of September term, 1865, states that the court had overruled the demurrer and ordered the respondents to answer over, and that by legal removes and continuances the petition comes to the present term of this court, where the parties again appear and are at issue upon the general denial of the allegations in the plaintiffs' bill, as on file. "The parties," means "the respondents." In the prior part of the order, the court had named the respondents, thirteen in number, being all there were, including the four children of Christopher and their guardian, and set forth that three of them, by name, were minors, and that Theodora D. was their guardian, and that the respondents were interested in the estate, as persons to whom bequests and devises were made by the will and codicils, and then the order went on to find that the petition was duly served and returned to the court at its July term, 1864, "when the parties appeared by their respective counsel, and the said minors were duly represented by their guardians," (referring also to Caldwell H. Colt and his guardian,) and that the cause was continued to a time when "the respondents" filed a demurrer to the petition, and "the parties" were at issue thereon, and the court "having heard them by their respective counsel, adjudged said demurrer insufficient, and overruled the same," and then the order proceeded as before recited, in respect to the answer. It is repeated in the decree of March term, 1866, that "the respondents" appeared at the July term, 1864, and demurred; that the demurrer was overruled; and that by legal continuances the action came to the September term, 1865, when and where the respondents filed their answer, as on file. Then the decree goes on to state that the court, on a hearing, found, as facts proved in the case that "the petition was duly served and returned to the court at the July term, 1864, the parties appeared by their respective counsel, and the said minors were duly represented by their guardians, and the said cause was continued "to a time" when the respondents filed a demurrer to said petition, and the parties were at issue thereon, and this court, having heard them by their respect-
396 ive counsel, adjudged said demurrer insufficient, and overruled the same, and ordered the respondents to answer over, and by legal removes and continuances the petition comes to the present term of this court, when the parties again appear, and are at issue upon a general denial of the allegations in the plaintiffs' bill as on file." So long as these orders and findings of a court that had jurisdiction of the subject-matter and of the parties stand, this court cannot, in this collateral suit, take any cognizance of the point

that the executors, even if they were before the superior court as trustees, opposed the claim of the plaintiffs, if there were otherwise any force in that point. This is not an appellate court. Any error in the decree of the superior court must be corrected by it on a direct application. Nor has this suit any such object. This same view applies to the point that Isabella did not employ counsel or appear. The decree finds that she appeared, and that as a respondent she answered. If she did not, she was of age; and was served with process, and so the decree went against her by default. The same view applies to the three minors and their guardian. They were all served with process. Each of the two decrees finds that they all appeared, and that "the said minors were duly represented by their guardians," (which includes Caldwell H. Colt, as well as these minors,) and that these minors and their guardian answered by the general answer of all the respondents. This must stand as verity till abrogated by the State court.

There is no force in the suggestion that the rights of the minors could not be adjudged till the youngest should become of age. If there was anything in this point it was one for the State court. At most, there was only error, not want of jurisdiction. The point could have been raised before the State court. If it was not, it cannot be taken here. As the State court did adjudge the rights of the minors, it manifestly was of opinion that they could be
397 adjudged, and, if it erred in that opinion, it alone can correct the error. But aside from this there was nothing which required the determination of the rights of the other parties, or of the rights of these minors, to await the arrival of the youngest of them at age.

The point is taken for such of the children of Christopher as were minors; that no guardian *ad litem* was appointed to represent them in the James B. suit; that their general guardian had no power to represent them; and that she did not, in fact, appear in the suit. The last suggestion has already been considered. The findings of the two decrees, that "the said minors were duly represented by their guardians," must stand till set aside. This court cannot set them aside in this collateral suit. This is the law in Connecticut, (Coit *vs.* Haven, 30 Conn., 190,) and the law everywhere. The question is one of regularity, not of jurisdiction, the guardian and minors having admittedly been served with process. Whether the guardian could represent the minors, or whether a guardian *ad litem* was necessary, was a question of local practice, and is settled for this court by the words "duly represented." (Thompson *vs.* Whitman, 18 Wallace, 457; Christmas *vs.* Russell, 5 Id., 290.)

Irrespective of this, it seems quite clear that, by the Connecticut practice, where the general guardian is made a party, and summoned and served for the minor, it is not necessary to have a guardian *ad litem*. (Reeves on Domestic Relations, p. 267; Swift's System, vol. 1, p. 217; Swift's Digest, vol. 1, p. 61; Wilford *vs.* Grant, Kirby, 114.)

In the brief of the plaintiffs there is strong criticism on the facts, that the executors each had a legacy of 50 shares of stock and its consequent residuary stock; that Mrs. S. Colt, one of them, had a legacy of 1,000 shares of stock and its consequent residuary stock; that she was also heir-at-law of one-third of 1,000 shares given to the two children who died before the testator, and which was held to be intestate estate, and of one-third of the corresponding residuary shares; that she was also guardian of Caldwell H. Colt, who had a legacy of 500 shares and its consequent residuary stock,
398 and was entitled to one-third of the said intestate estate and its consequent residuary shares; that Jarvis, as administrator of Henrietta J., was entitled to the same number of shares, as legacies and as intestate estate, as Caldwell H. Colt, and that the residuary stock claimed by the plaintiffs, if not going to them, would go in large part to the executors individually, and in the aforesaid capacities. It is also commented on in the brief, that, when the executors oppose the rights of the plaintiffs, "they were not slow, or wanting in zeal or energy, in supporting their own claims under the will," and particularly those of Mrs. S. Colt and her family; that they maintained before the court that the legacies of stock to the children of the testator who died before him were not lapsed legacies, so that such stock would go into the residuum, to increase the proportionate share of each legatee therein, but were intestate estate, and so would go to Mrs. S. Colt and the two children who survived the testator, and that they maintained the right of Mr. Jarvis to share in the primary and residuary stock. It is urged as "a significant fact that the court acceded to the grounds taken by the executors upon each and every question," including that as to the rights of these plaintiffs, and that the record and the conduct of the defense show "that the case of these plaintiffs was allowed to suffer, and all advantage of position before the court was sacrificed." The observations hereinbefore made constitute a full answer to these suggestions, and show that legally, actually, and morally there is no valid ground of complaint against the action of the executors.

It is deemed unnecessary to consider any questions as to the effect of the decrees of the court of probate in settling the accounts of the executors, or the distribution, or as to the effect of the releases and discharges given by the plaintiffs, or as to the effect of the alleged laches of the plaintiffs. The case has been considered on the merits, and on the effect of the suit in the Connecticut court, because the questions arising on those points have been deemed
399 to be controlling and decisive against the claims made in this suit by the plaintiffs.

The children of James B. claim in their answer: (1), That their father was entitled to a fee, and not a life estate in the $574\frac{26}{31}$ shares, and that they, as his only heirs-at-law, are entitled to a fee in said shares; (2), that their interest as the lawful issue of James B., in the residuary stock, in respect to the legacy of 500 shares which the original will give to the executors in trust for the issue

of James B., they to have such shares absolutely, with the accumulations thereof, when the youngest of them should have reached the age of twenty-one years, was not taken away by any codicil to the will; that they are entitled to a share in the residuum of stock in respect to said legacy of 500 shares, and that there was no revocation of their interest in said residuum. They do not claim that the remainder to them in respect to the primary legacy of 500 shares given to their father for life by the original will, which were to go as an absolute estate to his lawful issue after his death, was not revoked by the first codicil. They were not made parties to the James B. suit, nor did any one represent them therein, unless it was their father, as plaintiff, or the executors, as defendants. A brief is now presented on their behalf by Mr. George G. Sill. Of course, the most they can claim in this suit is the $574\frac{2}{3}\frac{6}{1}$ shares and the accumulations thereon since the death of their father. For anything beyond that, they must bring their own suit.

The petition of James B., in his suit, claimed so much of the residuary stock as appertained to the 500 shares which the will gave to him for life, or a life estate in it. The Connecticut courts decided that he took only a life estate in the residuum, and not an estate in fee, or, as the decree says, "a life estate only." So far as the children claim an interest in the $574\frac{2}{3}\frac{6}{1}$ shares as heirs-at-law of their father, they are, as they claim through him, bound by the adjudication as to his interest in the suit which he brought, and in which he claimed that his interest was a fee, and in which the point
400 was expressly raised and passed upon, adversely to him, and so adversely to them. It was not necessary, in that respect, that they should have been parties to the suit. Aside from this, the decision was correct. The ground on which it was put by the supreme court of errors, in 33 Connecticut, was, that such was the clear intent of the testator; that the residuary clause gave a ratable proportion of the residuary stock to the persons and parties to whom the 500 shares were given, namely, James B. and his children, to be enjoyed by a life estate in one and a remainder in the others; that, without the revocation, it would have been plain, that, as they were all parties to the original legacy, they must all take in like manner in the residuum; that the revocation was not sufficiently broad to take away the interest of James B. in the residuum, while it was broad enough to take away that of the children; and that there was nothing in the revocation to show an intention to enlarge the interest of James B., and such could not be the legal effect of a mere revocation of the interest of the children. These views are sound. His children urge as reasons why he took in fee all the stock which he took under the residuary clause, that, as a person before named in the will, to whom a legacy of stock was before given by the will, he was to have a share of the residuum, nothing being said about the nature of the estate; that the expression "rate and proportion" refers solely to the number of shares, and not to the character of the interest; and that the remainder

either went to James B., or falls into the residuum, or becomes intestate estate. They argue that it does not go into the residuum; that the other legatees are given a share only in the other shares than this remainder, because they are not given any share in any remainder; that, if it goes into the residuum, it must be divided among all the primary legatees, and, as James B. was one, his children must, as representing him, have a share of it; that it does not become intestate estate; and that it must go to the children of James B., as his heirs. There
401 does not appear to be any force in any of these suggestions sufficient to give to the children of James B. any share in such remainder, as representing their father. His interest in the shares was a life interest and died with him.

It is plain that the second codicil revoked the legacy made by the will of 500 shares to the executors in trust for the issue of James B. The brief of their counsel does not claim that it did not, though their answer does.

There remains the question as to the disposition to be made of the $574\frac{2}{3}\frac{6}{1}$ shares of stock which are in the hands of the executors by the termination of the life estate of James B. They are to be distributed as residuary stock, in like manner as if James B. had never had any interest in them, save as respects the dividends which belonged to them up to his death. They carry with them the dividends on them since his death, either with or without interest on those dividends. It is submitted by the executors that this part of the estate should, like the rest, be settled in the court of probate; that, as the special claims of the plaintiffs are rejected, the case stands as if it were a bill brought solely to determine the distributive share of each of the plaintiffs in the $574\frac{2}{3}\frac{6}{1}$ shares as assets of the testator, there being now no litigated question and the distribution being purely a matter of arithmetic; that the rest of the stock was distributed by the executors under the will, and their accounts of the distribution were rendered to the probate court; that these $574\frac{2}{3}\frac{6}{1}$ shares are all the assets which the estate now has, and the only funds for the payment of the fees and expenses of the executors, and of the fees of counsel and other expenses in this suit, and in any other suits, past or future; that it properly belongs to the court of probate to determine the amount of such fees and expenses; and that it may become necessary to sell the shares, or some of them, and the probate court is the proper court to direct such sale. In analogy to the jurisdiction which the superior court exercised in declaring what the amount of the residuum of
402 stock was, and who of the parties to the James B. suit were entitled to it, and in what proportions, it seems proper that this court, all the parties interested being before it, and the pleadings being such as to allow such a course, should by its decree declare the proportions in which the several parties are entitled to the $574\frac{2}{3}\frac{6}{1}$ shares. This question has not been presented, and the parties are entitled to be heard as to the figures, unless they shall

agree. The decree should then remit the matter to the executors, to carry out the decree on the basis established by it as to proportions, subject to the ordinary jurisdiction of the court of probate as to allowances of said fees and expenses out of the fund, and as to turning the shares into money by a sale of some or all of them, if and as it may find necessary, but without varying the relative rights of the parties in the shares, as established by the decree. This course is proper, in order to protect the executors and other parties from any further litigation by other suits, or other proceedings in the James B. suit, in respect to the matters adjudged in this suit, which protection a decree in this suit might not afford if it were only a decree dismissing the bill. The decree should contain distinct adjudications in accordance with the foregoing conclusions, as to the claims made by the plaintiffs in the bill, and as to the claims of the children of James B., and should charge the plaintiffs with the costs of the suit.

A. PAYNE,
T. W. DWIGHT,
L. C. ASHLEY,
And S. E. BALDWIN,
For the Plaintiffs.
GEORGE G. SILL,
For the Children of James B. Colt.
A. P. HYDE,
And E. C. PERKINS,
For the other Defendants.

And on the 20th day of September, A. D. 1881, the final decree in said cause, made in conformity with the foregoing opinion of court, was passed and entered, as follows, viz. :

403 In the Circuit Court of the United States, District of Connecticut.

LEBARON B. COLT, SAMUEL P. COLT, THEODORA G. COLT, Assignee, Frank E. DeWolf, and Isabella D. W. Colt DeWolf, Complainants,

versus

ELIZABETH HART COLT, for herself, and also as Executor, Trustee, and Guardian; Caldwell Hart Colt; Richard D. Hubbard, for himself, and also as Executor and Trustee; Richard W. H. Jarvis, for himself, and also as Executor, Trustee, and Administrator; Samuel Caldwell Colt, Matilda C. Root, and Harris Colt, as Executors; George D. Sergeant and Lois F. Sergeant, as Executors; Alice B. Colt, Norman Colt, James Colt, and Hugh Harbison, Administrator, Defendants.

Decree.

404 This cause came on to be heard at the term of this court, holden at New Haven, in said district, on the fourth

Tuesday of April, A. D. 1881, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered adjudged, and decreed as follows, viz.:

That the $574\frac{26}{31}$ shares of stock of the Colt's Patent Fire-arms Manufacturing Company, and the dividends accruing thereon since the death of James B. Colt, belong to the following-named persons in the proportions thereof annexed to their respective names:

Mrs. Elizabeth H. Colt	$\frac{1000}{4150}$	ths of said shares	and dividends.
Samuel C. Colt	$\frac{500}{4150}$	"	"
Caldwell H. Colt	$\frac{500}{4150}$	"	"
R. W. H. Jarvis, as adm'r of Henrietta Colt, dec'd	$\frac{500}{4150}$	"	"
Intestate estate of S. Colt, being for primary shares originally given to Samuel J. and Elizabeth Colt, dec'd	$\frac{1000}{4150}$	"	"
LeBaron B. Colt	$\frac{100}{4150}$	"	"
Samuel P. Colt	$\frac{100}{4150}$	"	"
Theodora G. Colt, assignee	$\frac{100}{4150}$	"	"
Frank E. DeWolf and Isabella D. W. Colt DeWolf	$\frac{100}{4150}$	"	"
Mrs. E. H. Colt, executor	$\frac{50}{4150}$	"	"
R. D. Hubbard, executor,	$\frac{50}{4150}$	"	"
405 R. W. H. Jarvis, executor	$\frac{50}{4150}$	"	"
Executors of E. H. Root	$\frac{50}{4150}$	"	"
Executors of L. P. Sargeant	$\frac{50}{4150}$	"	"

subject to any necessary sale or expenditure of the same, or any part thereof, by the executors of said will of Samuel Colt, in the settlement of the estate of said Samuel Colt; and that the said Alice B. Colt, Norman Colt, and James Colt, children of James B. Colt, are not entitled to any part of the said $574\frac{26}{31}$ shares, or of said dividends.

That the said plaintiffs, LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. DeWolf, and Isabella D. W. Colt DeWolf are not entitled to any other or further interest in the estate of said Samuel Colt, as claimed in and by their said bill of complaint, than their above proportions of said $574\frac{26}{31}$ shares of said stock and dividends, under the said will of said Samuel Colt.

That especially the said plaintiffs are not entitled to any residuary stock of said company, or dividends thereon, under said will, by virtue of the gift of five hundred shares of stock, as prayed in said bill, or to any interest in the dividends made upon the said
406 $574\frac{26}{31}$ shares, which accrued during the life of said James B. Colt.

And it is further ordered, that the said Elizabeth H. Colt, Rich-

ard D. Hubbard, and R. W. H. Jarvis, as executors of said will of Samuel Colt, after the final settlement of said estate of Samuel Colt in the probate *Colt* [court] of the district of Hartford, shall pay and deliver to each of the plaintiffs their proportional share, as hereinbefore stated, of the said $574\frac{2}{7}$ shares of said stock, and dividends thereon as aforesaid, or of so much thereof as shall be remaining in their hands upon the final settlement of said estate; or if the same or any part thereof have been sold in the settlement of said estate, shall pay to the plaintiffs their proportional share of the moneys arising from such dividends and sales and remaining in their hands for distribution after such settlement.

It is further ordered, that the plaintiffs pay the costs of the defendants in this suit, and a reference is hereby made to the clerk of this court as master, to examine and tax the same.

SAML. BLATCHFORD,
Circuit Judge.

107 I, Edwin E. Marvin, clerk of the circuit court of the United States of America, in and for the district of Connecticut, do certify that the foregoing is a true copy of the original bill of complaint, amendments thereto, answers, replications, pleadings, proceedings, evidence, opinion, and decree remaining on file, and of record in the case of LeBaron B. Colt and others against Elizabeth Hart Colt and others, in said court.

In testimony whereof, I have hereunto set my hand and seal of said court, at Hartford, in the said district of Connecticut, this fifth day of October, A. D. 1881.

[SEAL.] E. E. MARVIN, *Clerk.*

Endorsed on cover: Connecticut C. C. U. S. No. 343. LeBaron B. Colt, Samuel P. Colt, *et al.*, appellants, *vs.* Elizabeth H. Colt, individually, and as executrix, guardian, and trustee; Caldwell Hart Colt; Richard D. Hubbard, individually, and as executor and trustee, *et al.* Filed October 8th, 1881.

111—566

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Supreme Court of the United States.

October Term, 1883.

In Equity, No. 343.

LE BARON B. COLT *et al.*, *Appellants*,

vs.

ELIZABETH H. COLT *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR THE COMPLAINANTS.

SIMEON E. BALDWIN,
L. C. ASHLEY,
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Counsel for Complainants.

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Supreme Court of the United States.

LE BARON B. COLT, *et al.*, *vs.* ELIZABETH H. COLT, *et al.*	*In Equity, No. 343.*

BRIEF FOR COMPLAINANTS.

This bill is brought by the complainants against Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, Trustees under the will of Samuel Colt, to recover certain stock given them in trust for the complainants, and the accumulations thereon, and for an account.

The same persons in their capacity as executors of the will, and the other defendants (who are legatees or representatives of legatees in said will), are made parties, on account of their interest in the subject matter, and by reason of their secondary or *ultimate* liability for the claim against the trustees, as hereinafter shown.

The action was commenced Jan. 4, 1879, in the United States Circuit Court for the District of Connecticut, and was heard upon the bill, answers, and proofs, before said court at the April Term, 1881, which trial resulted in the decree contained in pages 262, 263, 264 of Record. The case now comes before this Honorable Court upon an appeal by the complainants from the decision and decree of the Circuit Court.

STATEMENT.

The complainants, Le Baron B. Colt, Samuel P. Colt, and Isabella D. W. Colt De Wolf, wife of Frank E. De Wolf, are children of the late Christopher Colt, who was a brother of the testator. Edward D. Colt, another son, deceased Oct. 10, 1868, and his share in the legacies under the will and codicils hereinafter mentioned has been assigned by his administrator to his mother, Theodora G. Colt, who is joined as complainant with the parties above named.

There is another son — George D. Colt — who was the eldest son of Christopher, but who was excluded in the legacy of stock in the second codicil of said will, and is, therefore, not a party in this case.

The testator, Samuel Colt, late of Hartford, Connecticut, made his last will and testament on the sixth day of June, 1856, and thereafter made two codicils thereto — one dated Jan. 12, 1858, and the other dated Feb. 2, 1859.

Comprised in the property disposed of by the will were 9,996 shares of the corporate stock of the Colt's Patent Fire-Arms Manufacturing Company, located at

Hartford, a corporation founded and built up by the testator, and carried on by him during his life as sole owner, with the trifling exception of four shares of stock — the whole capital stock consisting of 10,000 shares.

A concise statement of the bequests of stock in the original will, as well as in the codicils, will be found in the appendix to our brief, and may be conveniently referred to.

The scheme of the testator's will in the disposition of this stock is as follows: He first gives certain legacies of definite quantities of the stock to various legatees: and then to all those to whom such legacies are given he bequeaths the balance of said stock belonging to him* in the ratio and proportion of their preceding legacies; his design evidently being to unite with each "primary legacy" of the stock a corresponding proportion of the rest of the stock.

This arrangement he effected by the following clause:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath and devise as follows: All the remaining stock of said Colt's Patent Fire-Arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I

*NOTE.— The defendants, in referring to these bequests, call them "*primary legacies*." Without conceding the technical accuracy of this designation, we deem it best for the convenience of reference, and for the sake of uniformity, to adopt it in our brief. We shall therefore speak of these as primary legacies; and the gift of the proportional part of the rest of the stock, which by the clause of the will next cited is united with each of these primary legacies, we call an "accompanying legacy," or "corresponding legacy."

have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies and in precisely the same ratable proportions."

(Record, p. 60.)

Among these primary legacies was one to the testator's brother, James B. Colt, to whom he gave 500 shares for life, remainder to his issue, as follows:

"To my brother James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement during his life of five hundred shares of the stock of said Colt's Patent Fire-Arms Manufacturing Company, and after the death of my said brother to his issue lawfully begotten as an absolute estate. This bequest is on condition that the said James B. Colt shall waive and relinquish all claims and demands, actual or pretended, which he may have against me or against said Colt's Patent Fire-Arms Manufacturing Company."

(Record, p. 56.)

Also a primary legacy to the executors upon an active trust for the issue of said James B. Colt, as follows:

"I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Patent Fire-Arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have

reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate."

(Record, p. 56.

After the execution of the will and before the execution of the first codicil (a period of about one year and seven months), an alienation evidently sprang up between the testator and his brother James, on account of the conduct of the latter, which the testator considered to be "*unbrotherly*," and this determined the testator to revoke the legacy to him, which he does accordingly, in the first codicil, as follows:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of Colt's Patent Fire-Arms Manufacturing Company, given in the aforesaid will to James B. Colt, for life, remainder to his children; and in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

(Record, pp. 61–2.)

In our view of the case, the primary legacy to James B. Colt being revoked, the revocation carried with it also its accompanying legacy of the proportion of the residue of the stock united with it.

An examination of the testator's manner of dealing in the codicils with this and other legacies will show, we think, that his idea and intention was, that having by the will directed the residue of the stock to follow the *primary legacies* in corresponding proportions, an alteration of the direction of the *primary legacy* would carry with it its proportion of the residue of the stock.

The expression of the *motive* which impelled him to make the above revocation, is furthermore a sufficient indication of his design in this instance.

By the second codicil (Record, p. 62) the testator proceeds a step farther in the direction already taken with reference to the gifts to his brother and his brother's family; and he now, in this codicil, executed a little more than a year after the first one, proceeds to cut off *his brother's children* from any interest under his will, except a gift of one hundred dollars each.

The codicil in terms revokes the gift of the *use and benefit* of the 500 shares to the children of James B., but while not disturbing the bequest of the stock itself to the trustees, substitutes the children of Christopher Colt (with the exception of the eldest) as the beneficiaries thereof; and directs it to be held by the trustees for the said last named children in the same manner and subject to the same limitations as are provided in the original will in the bequest for the benefit of the children of said James B. Colt. And the testator immediately adds to this a declaration confirming and establishing the original will as altered, changed, and modified by this and the previous codicil, as and for his last will and testament.

The portion of the second codicil effecting this change is as follows:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made TO OR FOR THE USE AND BENEFIT of said children or any of them. I give to the eldest son of my brother Christopher Colt a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are canceled and revoked and I hereby give, bequeath

and devise to the other children of my said brother (said eldest son not being included herein) the property to wit: five hundred shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the aid of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children and the property hereby bequeathed is to be held by my executors for said children IN THE SAME MANNER AND SUBJECT TO THE SAME LIMITATIONS AS ARE PROVIDED IN SAID ORIGINAL WILL IN THE BEQUEST TO THE CHILDREN OF SAID JAMES B. COLT. And I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil as and for my last will and testament." (Record pp. 62–3.)

It is not a *revocation* of the legacy, but merely a change of the *cestuis* by way of *substitution*. *Nor* is it a revocation of the *union* established in the will between the primary legacy and its corresponding residuary stock.

It continues and confirms to the trustees the legacy in the original will. And this legacy covered the 500 shares of stock and its accompanying proportions of the residue of the stock.

The latter and its accumulations form the subject of this suit, which is brought to recover the same and for an account.

By the original will the testator's wife, Elizabeth H. Colt, and Richard D. Hubbard and Henry C. Deming, were appointed executors. R. W. H. Jarvis is substituted in place of Henry C. Deming by the first codicil.

Samuel Colt, the testator, deceased Jan. 10, 1862, leaving an immense estate, amounting to upwards of

$3,000,000 over and above all claims and indebtedness. The will was proved in the Probate Court for the District of Hartford, February 6th, 1862, and the executors, Colt, Hubbard and Jarvis, accepted.

The executors entered upon the execution of their office and also assumed the duties of their appointment as trustees for the children of Christopher Colt under the provisions of the will and second codicil.

See Letter of R. D. Hubbard to Mrs. Theodora G. Colt, Guardian, dated Dec. 6, 1862, Ex. F., (Record, p. 89).
Also Testimony of T. G. Colt (Record, pp. 87–8).

They commenced making payments as trustees under the will for the benefit of these children in January, 1863.

Testimony of Theodora G. Colt, above referred to.
Letters of R. D. Hubbard, Ex. F. & G., (Record, pp. 89–90).
Also the account of the Trust Income, (Record, p. 132).

James B. Colt, however, whose primary legacy of 500 shares for life, etc., was revoked by the first codicil and given over to the trustees of the "School," came forward with a claim for the accompanying legacy of a proportion of the residuary stock; contending that the revocation of the primary bequest did not work a revocation of its "accompanying legacy."

The proportion of the *residuary* stock, as given by the original will, appertaining to the respective primary legacies was nearly trebled in amount by the revocation in the second codicil of a bequest to the

School for Practical Mechanics and Engineers of 2,500 shares, augmented to 3,000 shares by the first codicil.

In June, 1864, James B. Colt brought a suit in equity in the Superior Court of Hartford County, Conn., against the executors and others, claiming, in substance, that he was entitled to a proportion of the *residuary* stock corresponding to the amount of the *primary legacy* of stock given to him by the original will for life, *Exhibit E.* (Record, p. 50.)

The plaintiff showed by his bill that the testator's estate amounted to more than $3,000,000 over and above all debts and claims, and prayed that the amount of the residuum and the parties entitled thereto might be ascertained, and especially the number of shares in which the plaintiff, James B. Colt, had an interest under the will, and for an account, and for other relief.

To this bill the defendants, E. H. Colt, R. D. Hubbard, and R. W. H. Jarvis, were made parties in their capacity as executors, and each of them individually as legatees of certain bequests of stock given to each of them individually by the will, and the said E. H. Colt also as administratrix on the estate of Henrietta Colt, deceased, also as guardian of Caldwell Hart Colt, a minor.

THEY WERE NOT MADE PARTIES IN THEIR CAPACITY AS TRUSTEES OF THE CHILDREN OF CHRISTOPHER COLT under the will, nor were they ever, at any time, brought into the case as trustees, as appears by the record, as well as by the statement to that effect in their answer in this case.

See Defendant's Answer, (Record, p. 80):

Also record in Colt *vs.* Colt (Record p. 64 *et seq.*).

The children of Christopher Colt, all but one of whom were minors — and their mother, as probate guardian — were also made parties. These children of Christopher were entirely ignorant of legal business, as also, in fact, was their mother, who acted as probate guardian, having never had any experience in such matters. At the same time, they reposed the most implicit confidence in the executors and trustees, especially in Gov. Hubbard, and relied upon their doing everything that could be done to subserve their interests, support their claims and protect their rights under the will.

See Testimony of Theodora G. Colt,
Record, pp. 87–9.
Le Baron B. Colt, p. 91.
Samuel P. Colt, p. 92.
I. D. W. C. De Wolf, pp. 99–100.

And assurances from the trustees, as well as the circumstances, supported this reliance. (See Letter of Gov. Hubbard to Mrs. T. G. Colt, Ex. H., pp. 90–1), where he says:

"I shall always be happy to do anything in my "power *for the advantage of the interest represented* "*by y'r family*."

Also Letter of Gov. Hubbard to Le Baron B. Colt, Ex. L., p. 182:

"I shall endeavor in this, *as I always have done*, to "protect your just rights in anything which lies in "my power."

See also Testimony of I. D. W. C. De Wolf, Record, p. 100; and of T. G. Colt, p. 165.

Notwithstanding the infancy of all but one of these children (the sister, Isabella D. W.), at the commencement of the suit, and the continuing minority of all but one of the others during its whole pendency, no *guardians ad litem*, to represent them, or any of them, in the case were appointed. (See Record in Colt *vs.* Colt, above referred to.)

The executors appeared and put in a demurrer, upon which the case went to the Supreme Court of Errors, where the demurrer was overruled and the right of James B. Colt to a share of the residuary stock was affirmed.

Colt *vs.* Colt, 32 Conn. 422.

The executors then filed as an answer in the case a general denial, signed by Hubbard & McFarland, as attorneys, and purporting to be pleaded in behalf of all the defendants as the "*Respondent's Answer*" in the case.

See Record, in Colt *vs.* Colt (Record p. 65).

They were thus placed before the Court in such a position as to be naturally looked to as parties whose course in relation to our claim would, if they did not support it, be likely to be taken as showing that such a claim was not seriously and gravely thought to exist.

At this stage of the case the active parties in it called upon the Court to ascertain the amount of the residuum of the stock after deducting the primary legacies — under the prayer in the petition to that effect. The Court having already decided — and wrongly, as we contend — that the revocation of the primary legacy to James B. did not work a revocation of its accompanying proportion of the residuary stock, it was now sought to apply this ruling to the clause in the second

codicil, giving to us the beneficial interest bequeathed in the original will to the children of James B., on the ground that it should be construed to be a bequest to us only of the beneficial interest in the primary legacy; and since a revocation of a primary legacy had been held not to work a revocation of its accompanying proportion of the residue, so it was contended a gift over to other parties of a primary legacy would not carry with it its accompanying proportion of the residuary stock. This strange reasoning left out of view the fact that this was a bequest to trustees — never revoked as such — but left standing and confirmed — the children of Christopher being only substituted for the original beneficiaries; and also left out of view other striking differences between the two cases.

The children of Christopher Colt did not dream of the possibility of the executors (who were at the same time their trustees, though not parties to the case as such) *opposing* their interests.

Their mother, Mrs. Colt, having heard that James B., the complainant in that case, had thought of making some claim in opposition to their right to the residuary stock, called upon him with reference to it, and he agreed not to make any such point or question in the case; and Mrs. Colt says: "Consequently I thought it was an end to that." It was settled that James B. would raise no such question, and that the executors should do so seemed to them an impossibility. (See Evidence of T.G. Colt, Record, pp. 87–8; also *Id.* p. 165 *et seq;* also Evidence of L. B. B. Colt, p. 91.)

One of the complainants testifies that she was assured by one of the executors that he would protect her interests and advocate her claims in the suit. See Evidence I. D. W. C. De Wolf, p. 100.

The defendants contend that Henry C. Robinson, Esq., of Hartford, was authorized to appear and did appear for the children of Christopher Colt, in the case. It is true that Mr. Robinson was retained on his own account by Edward D. Colt (now deceased), who came of age during the pendency of the suit; but the others deny that he was retained for them, or that they ever authorized any such retainer. (See Testimony of Theodora G. Colt, L. B. B. Colt, S. P. Colt, H. C. Robinson.)

S. P. Colt was at that time only about twelve years of age, and says he never knew there was such a man as Henry C. Robinson until after that case was finished. L. B. B. Colt was at "school or college" and "paid no attention to the James B. Colt litigation." Mrs. Theodora G. Colt gives her reason for not employing counsel, that she considered that the duty of protecting the rights of her children devolved upon the trustees, and to them she preferred to leave it; family considerations on account of their relationship to James B. influencing her in deciding that the defence of their rights should be made through the trustees, a course which she deemed it equally safe and proper to adopt.

Testimony of S. P. Colt, Record, p. 92; also p. 168.
Also Testimony L. B. B. Colt, p. 91; also pp. 173–4.
Also Testimony T. G. Colt, pp. 87–9; also pp. 163–7.

There seems to have been a grave misunderstanding about this matter somewhere. At all events, no competent authority to appear in the case could be obtained from the minors, nor could their probate guardian appear for them in the absence of any guardians

ad litem. At the same time this was an active trust to the defendant trustees, who alone had the legal title, and who were to keep and hold the property during a specified term, and who could not permit their title to be interfered with, managed, influenced or disposed of, through the appearance in any legal proceeding, or the action, of whatever nature, of the *cestuis* or any other parties.

They, however, being made parties in the case, as executors and not as trustees, did not deem themselves called upon to advocate and support the rights of the *cestuis*, but, as will be seen, took an opposite course.

They filed a brief, purporting to be in behalf of the defendants generally, in which they not only did not support the claim of the trustees, and that of the *cestuis que trust* to their proportion of the residuary stock, but, more than that, they actively *opposed the claim*, and devoted two printed pages to an argument in opposition to it. (See Ex. D, Record, p. 38.)

They in no manner brought into view the difference between the provisions of the second codicil, relating to the legacy for our benefit, and those of the first codicil, revoking the legacy to James B. Colt for life, etc.; they did not suggest that, in our case, the legacy of stock given to the trustees by the will was not *revoked* by the second codicil — that merely the beneficiaries were changed, and the children of Christopher put in the place of the children of James B. by *substitution;* that the codicil, *in its terms*, purported only to withdraw from the children of James B. their *beneficial interest*, and under the settled rules of construction recognized by the Court in that case, its operation could extend no further, as in order to give it its full effect it was not necessary any further to disturb the provisions of the will. Nor that, at the

same moment, and by the same act, the testator substituted us in their place, using words which transferred to us the beneficial interest in identically "*the property*" which was bequeathed to the trustees by the will; nor did they call attention to the fact that the primary legacy and its accompanying residuary stock were bequeathed to them as *trustees* by the will, and *confirmed* to them and *continued* in their hands by the terms of the codicil, so that, as legatees in trust thereof, they are in fact, parties *thereinbefore named* in the original will, even in the sense adopted by the Court in Connecticut; nor suggest any other of the striking arguments of which the case is capable, which tend to the establishment of our rights.

To say the least, in any case which could affect the title to this trust property, these points should have been presented and argued to the Court in behalf of the trustees and of the *cestuis*. But these defendants not being parties to that case as trustees, did not feel called upon to raise the question of their title as such.

It will be observed that the issue was made up exclusively upon the question of the title of "the children of Christopher Colt," and not upon the title of the *trustees*, who are in fact the real legatees; and thus one of the strongest positions in our favor was disregarded.

See Record, p. 68.
Also Colt *vs.* Colt, 33 Conn. p. 278.

The result was that the Court acceded to the views of the executors, evidently without going into a thorough examination of the matter, and decided accordingly, giving their opinion in six lines. (See Colt *vs.* Colt, 33 Conn. 280.) Judgment was rendered by the Superior Court at its February Term, 1866, pursuant to the advice of the Supreme Court of Errors as contained in the decision referred to.

The defendants' answer states that the executors proceeded to distribute the residuary stock accordingly. (See Defendants' Answer, p. 77.)

And the defendants now contend that if, upon a fair examination of the will, it is established that it gives to the trustees for our benefit, the property which we demand of them in this suit, still we cannot recover it by reason of the judgment referred to. Undoubtedly the gift to them of the trust property and their acceptance of the trust fixed their responsibility to the *cestuis* for the property so given them; and yet they undertake to set up as a discharge from that liability, a judgment rendered in a case in which the trustees were not parties, and whose nature was such as to admit of their appearing in it in a character hostile to us and to their own title as trustees.

More than this, they had long before assumed the administration of their duties as trustees, keeping a separate account of, at least, part of the trust income, and appropriating from time to time portions thereof to the purposes directed in the trust clause under which they acted. They were, therefore, *trustees in possession*, and, being so, were and must be held to have been trustees in possession of whatever the will gives them as trustees for our benefit. And yet they seek to set up, as divesting them of this property, a judgment to which the trustees as such were not parties, and in a case in which the defendants could and did oppose us, and deny the trust title. And this, too, where the trust was an active one, which required them to take, hold, and administer during a definite period the trust property, to which they alone had the legal claim, including the right to its exclusive possession, and must necessarily have been, therefore, REAL PARTIES IN INTEREST, in any suit affecting their claim to it, from the moment they proved the will.

The will contained (see Ex. A, Record, p. 60) a legacy to each of the executors of 50 shares of stock, and its corresponding residuary stock.

There was also an individual legacy to one of them, Elizabeth H. Colt, of 1,000 shares, and its corresponding residuary stock. (Ibid, p. 55.)

She was also heir-at-law of one-third part of two bequests of 500 shares each, given by the will to children of the testator who deceased before him, which, thereby, it was held, under the Connecticut law became intestate property; and she took, of course, one-third of the residuary stock corresponding thereto.

She was also the guardian of her son, Caldwell Hart Colt, to whom a primary legacy of 500 shares were given, and who also took one-third of the intestate stock referred to. (Ibid, p. 55.)

Another of the trustees, R. W. H. Jarvis, was the administrator of his niece (a deceased daughter of Mrs. E. H. Colt, viz.: Henrietta J. Colt), to whom a primary legacy of 500 shares was given in the will, and who also inherited one-third of the intestate stock. The primary legacies and the intestate primary shares respectively carried with them, of course, their corresponding proportions of the residuary stock; and if our right to a proportion of the residuary stock was denied, these parties would, of course, participate in what would otherwise be coming to us.

And it will be seen by the statement in the appendix of the bequests of stock made by the will and codicils, that our proportion of the residuary stock, purporting to be passed upon by this decision, is thereby (if it should be maintained and held binding upon us) trans-

ferred in great part to the defendants, Colt, Hubbard and Jarvis, individually, and in their capacities aforesaid.

It is evident, therefore, that no such judgment could be set up here against us on the ground of the presence of our trustees as parties in that case (opposing as they did the trust claim), as it would then constitute a *constructive fraud* upon our rights, and would, at least, show upon its face that the proceedings were conducted under a mistake of the parties as to their rights and duties, and, in either case, should be set aside, or the defendants restrained from setting it up in defence of our claim.

The defendants, therefore, by their answer, do not undertake to support the judgment as a defence on any such untenable ground as that the trustees were parties to it. They must, therefore, seek to put it on some other ground. If that ground should be that they were not trustees at the time of its rendition, a sufficient answer will be found in our Brief — if, in fact, it needs any answer or discussion — to show that they were trustees from the time of the probate of the will; indeed, if so absurd a conclusion, as that they were not, should be asked for, it is a sufficient reply to say that upon the probate of the will the *right* to the trust legacy vested in them, and they were trustees thereof, and it never was divested; and to make so untenable a proposition as that for any reason they were not at that time occupying the position of trustees, would be simply saying that the post had, for some reason, become temporarily vacant.

But a trust never fails for a moment for want of a trustee; and the means of supplying that necessary party is well known in a proceeding in equity, if the post happens to be vacant; and the absence of trus-

tees is, therefore, no less a defect on the ground stated. Even if it could, with any show of reason, be said that the defendants did not become trustees until a later day it would, consequently, amount to nothing in support of the judgment as a bar; for whenever they *did* take the trust, they would take it unabridged by the judgment, and would be liable to us for whatever the will gives them as trustees. The judgment has, therefore, in any view of it, no bearing upon or relevancy to the case at bar.

While the executors denied and opposed our rights as *cestuis* (and their own as trustees for us,) they were not slow, or wanting in zeal or energy, in supporting their own claims under the will, and particularly those of one of their number, Mrs. E. H. Colt, as well as those of her family.

One of the questions reserved for decision in the Supreme Court of Errors was, whether the legacies to the children of the testator, who deceased in his lifetime lapsed, or whether they were to be considered as intestate estate. In the former case, they would have passed into the residuum, and would have increased each proportionate share of the residuary stock. In the latter case, they would go to the heirs of such deceased children. Those heirs were Mrs. E. H. Colt and her son and daughter. The executors took the course (to say the least, somewhat remarkable for executors,) of contending against the theory that the property was disposed of by the will under which they acted, and *maintained that an intestacy was created.* They obtained a decision to that effect, and secured this property to Mrs. E. H. Colt and her family.

The course pursued in the management of this case generally for the defence was of an equally remarkable character, and should be referred to here as a part of the history of the transaction.

The questions reserved for decision in the Supreme Court were made up at the September Term, 1865, of the Superior Court, as shown by the record (p. 65). The respondents' answer was filed *afterwards* at the December Term, 1865 (p. 65). When that answer was filed, therefore, the defendants well knew what the questions were which were to be tried, and that one of them related to our interest in the residuary stock. The attorneys of the executors, however, Hubbard & McFarland, filed an answer purporting to be *the answer of all the respondents in the case*, and yet there is not the slightest pretence that these attorneys were ever in any manner authorized to appear for the children of Christopher Colt, excepting so far as the executors may have assumed to instruct them to that effect, without obtaining any consent from the children of Christopher Colt so to do. *No other answer was filed in the case* — none whatever having been put in by Mr. Robinson, *and no entry of any appearance having been made by him*, is shown by the record in that case. *There is no authorized appearance for the cestuis shown by the record.* (See Record.) All the counsel who appeared for the respondents in that suit stood upon the answer aforesaid filed by Hubbard & McFarland, confessedly without any authority beyond that of the executors. Probably the executors considered that, acting in their capacity as such, they might reasonably assume to answer for all of the defendants, without asking for special authority; if so, they should at least have maintained the same course consistently throughout, and should not have antagonized the rights of any of the defendants for whom they had assumed to speak. Having taken the position referred to, they proceeded, as defendants, to oppose the claims of the plaintiff, James B. Colt, upon all the questions reserved for decision excepting one, and that one was the question in relation to our

interest in the residuary stock. Upon this question they went over and sided with the plaintiff against us; and thus (since the record defence was constituted of, and stood upon, the answer filed by them, as aforesaid,) practically arrayed all the record parties, plaintiffs and defendants, on the same side, to crush out our claim to the residuary stock.

It will be thus seen that the executors, even in that capacity, in their brief and in their arguments, contended for and upheld the rights of *other* legatees, while in the case of our interest, they put themselves in opposition to it; whereas it would appear as if ours were the claim to which they ought to have been most friendly, as this was the only stock which was confided to their care in that other sacred and confidential character as trustees. So that, although they were not present as parties in the capacity of trustees, it would seem they ought not to have been inimical to our rights in any capacity whatever.

Although one of the executors — Mr. Jarvis — was appointed by codicil and not named in the original will, yet, when it came to a question of his rights, the executors successfully appealed to the Court to respect and follow the testator's intention, and give him the primary legacy and its corresponding residuary stock.

It is a significant fact that the Court acceded to the grounds taken by the executors upon each and every question; and whatever may be said about the character of the appearance of Mr. Robinson, the record and the conduct of the defence show that, in the substantial and important particulars referred to, our case was allowed to suffer, and all advantage of position before the Court was sacrificed.

Gov. Hubbard, in his letter to Mrs. T. G. Colt, after the decision (*Exhibit H, p.* 90), says the deci-

sion was a "logical absurdity." He also says, "*if "your family had joined others in opposing the "Judge's claim, I think this last result would not have "happened.*" It seems then that Gov. Hubbard considered the matter of the *attitude of parties upon a question before the Court* as one of so much importance that it might even change the nature of the result and secure a decision directly opposite to the one arrived at, upon a given question.

How can it be said, if the Court decided correctly, that "this last result would not have happened"; or, in other words, that the decision would have been different if Mrs. Colt had appeared actively at a former hearing in the case, instead of leaving the protection of the rights of the *cestuis* entirely in the hands of the trustees — and especially when she could not appear for them legally in the absence of guardians *ad litem?* If it was according to law, the decision upon our claim, which is alluded to "as this last result," could not have been different. If it could have been different, it was not according to law.

The trustees, if we may judge of their views by the expressions of Gov. Hubbard, regarded both the decisions as absurdly wrong. He says (*Exhibit II, p.* 90), "to my mind two things are as certain as that "two and two make four. First, that Jas. Colt was "not entitled to a share under the will; and next, that "the very share which the Court has given to him in "the residuum belongs to your children. I defy any "person who is not afflicted with 'judicial blindness' "to come to any other conclusion upon any natural "rule of interpretation. But after the first error was "made the second came as a matter of inevitable "necessity."

Such being their opinion of the prior decision on demurrer, one would suppose that they would have

sought to *limit its unjust effects* by bringing out the points of distinction between our claim and that of James B. Colt; instead of seeking to involve us in the evil consequences of an unjust and mistaken decision, by urging that our claim came clearly within the rule there adopted, and soliciting its application thereto, to insure the defeat of our rights.

And the result of all this would be, if carried out successfully, that we would be made the sole sufferers by this complication of unjust proceedings. The erroneous decision giving James B. Colt a share of the residuary stock was more than balanced by the erroneous decision depriving us of our share of precisely the same amount—and thus the other legatees sharing in the residuary stock would be safe and uninjured, while we would be left to bear alone the whole burden of the ills flowing from this double judicial error.

See Tables in Appendix.

"What he has already received" (says Governor Hubbard), "is only so much taken from your family "—given to him, in my judgment, simply because "he was poor."

See Ex. L, Record, p. 182.

And indeed, while we would be thus left to suffer alone, the other legatees would not only remain unharmed, but they claim to be *materially benefited* by the erroneous decisions referred to, if sustained and taken together. For, while one decision would deprive us of our residuary stock, the other, it must be observed, gave it over to James B. Colt, *for life only;* and the legatees generally now claim to share in the remainder, his life interest having terminated. As a matter of fact, however, it should be remarked that that judgment expressly excludes any decision as to

the ownership or disposition of the remainder in that stock, which is still in the hands of the defendants, to be disposed of as the Court shall now direct.

James B. Colt died October 28, 1878. (Bill, p. 7, and Answer, p. 76). The stock awarded to him for life by the above decision, viz., 574 26–31 shares, remains in the hands of the executors, to be disposed of as the Court shall decide. (See Answer, pp. 76 and 79.)

The youngest of the complainants in this case came of age January 10, 1873, and at that time the primary legacy of 500 shares of stock and its accumulations were transferred to Christopher's children, without its corresponding residuary stock and the accumulations thereof.

The statements made up at that time embraced only the 500 shares and the accumulations thereon, and the whole transaction constituting the so-called "settlement" then had with the *cestuis* was based upon this erroneous calculation of their rights.

Certain receipts are set up in the defendants' answer as having been at that time taken from the *cestuis*.

The examination of the matter in our Brief shows, we think, that they are not by their terms a discharge in full, while one of them is not a receipt to the trustees at all, but only to the executors, and that, in any event, the circumstances in which they were given, and the erroneous basis upon which the calculation of the rights of the *cestuis* was made up, and the consideration that the trustees could not take receipts or releases in full, while continuing to hold property,

rights or interests to the benefit of which the *cestuis* are entitled, disposes effectually of the attempt to use these receipts as a discharge for anything beyond what the trustees have turned over to their *cestuis*, and for which in the absence of such receipts they would be liable.

By these receipts, it appears, that the defendants, Colt, Hubbard and Jarvis, charged the complainants $5,500 as their compensation as trustees, beside and distinct from their compensation as executors, which latter was provided in the will.

The executors have rendered certain accounts of their administration of said estate to the Court of Probate for the District of Hartford, as set out in the answer, and claim that the settlement of these accounts constitutes a bar as against the plaintiffs in this action.

The consideration of this subject in our Brief makes it clear, we think that the matter of our title to the residuary stock was beyond the sphere of the jurisdiction of the Probate Court, which could not pass upon the question of the amount of a legacy and to whom it was payable; and further shows that that Court did not undertake to pass upon the question at all; and its proceedings, therefore, cannot affect the issues in this case.

The fact that the defendants, Colt, Hubbard and Jarvis, had filed the Brief referred to in the case of Colt *vs.* Colt, denying our claim and their own title as trustees, did not come to the knowledge of the *cestuis* until the 27th day of December, 1878.

See Testimony of L. B. B. Colt, p. 91.
Testimony of Theodora G. Colt, p. 87.
Testimony of Isabella D. W. C. De Wolf, p. 99.

The result in this case should depend simply upon the construction of the testator's will.

If a fair examination shows that it bequeaths to our trustees the stock for which we here claim an account, justice requires that we should be allowed to recover it. To find that the will gives our trustees this property is, in fact, an answer to all the defences attempted to be set up. If it does, then the judgment referred to cannot be a bar, because the trustees were not parties to it, and because in their capacity as executors they opposed our rights, and therefore cannot set it up as a defence in this equitable proceeding. So, if the will gives the property for our benefit, the probate proceedings do not cut us off, because the Probate Court *could not* pass upon the question of the amount of our legacy, and did not, in fact, decide any such question. Again, if the will gives to our trustees more property or greater rights or claims than they have transferred to us, they could not, while holding such property rights or claims, take a receipt or release as trustees, freeing them from their liability to us therefor.

The defendant trustees are *primarily* liable to us for the property and its accumulations, but have their right of resort to the estate and the other parties defendant, so far as they may have participated in the trust property by any mistaken appropriation of it. We have seen that 574 26–31 shares of stock still remain undisposed of. They should be decreed to hold

that, as trustees for our benefit, toward making up the amount to which we are entitled, so far as it will go, and for the balance they may resort to the other parties defendant to the extent of their claim against them for their participation respectively in the trust property. At the same time the estate and the other parties defendant are liable to us *secondarily* or *ultimately* in this action.

SPECIFICATION OF ERRORS IN DECREE OF CIRCUIT COURT AS CLAIMED BY PLAINTIFFS.

1. That the decree is erroneous, in that it adjudges that the 574 26-31 shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company therein menticned and the accumulations thereof belong to the parties therein named as entitled to the same in the proportions therein specified. And in that said decree does not adjudge the said 574 26-31 shares of stock and its accumulations to belong to the plaintiffs. And in that it directs the transfer or payment to the plaintiffs only of the proportional share thereof stated and specified in said decree as belonging to them.

2. That the decree, after adjudging that said 574 26-31 shares of said stock belong to certain parties as aforesaid, and in said proportions, further adjudges:

"That the said plaintiffs, LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. De

Wolf, and Isabella D. W. Colt DeWolf are not entitled to any other or further interest in the estate of said Samuel Colt, as claimed in and by their said bill of complaint, than their above proportions of said 574 26-31 shares of said stock and dividends, under the said will of Samuel Colt.

"That especially the said plaintiffs are not entitled to any residuary stock of said company, or dividends thereon, under said will, by virtue of the gift of five hundred shares of stock, as prayed in said bill, or to any interest in the dividends made upon the said 574 26-31 shares which accrued during the life of said James B. Colt."

POINTS.

CONSTRUCTION OF THE WILL CONSIDERED.

I.

THE TESTATOR'S MEANING AS SHOWN BY THE INSTRUMENT.

The scheme of the testator's will is unmistakably apparent.

He died possessed of an immense estate valued at something over $3,000,000 above all claims and liabilities. Comprised in it were 9,996 shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company — a corporation built up and owned by the testator.

The bequests under the will consist largely of legacies of this stock.

To his wife, Elizabeth H. Colt, he gives in *lieu of dower* a gross legacy of $30,000, a life interest in 1,000 shares of stock, and in certain real estate.

To each child hereafter born to him in lawful wedlock he gives 500 shares of stock, also certain real estate in trust.

To his step-mother he gives an annuity of six hundred dollars a year on certain conditions.

To his brother James B. Colt he gives 500 shares of stock for life, remainder to his children, on condition that he waive and relinquish all claims against the testator, or the Company.

To his brother James B. Colt's children he gives 500 shares of stock, to be held by his executors in trust.

To his nephew Samuel C. Colt, son of another brother, he gives an annuity until twenty-one, and then a gross legacy of $5,000, 500 shares of stock, and certain real estate.

To his brother Christopher's children he gives annuities until twenty-one, and then to each a gross legacy of $2,500, and 100 shares of stock.

To Luther P. Sargeant he gives 50 shares of stock, if he shall at the time of his decease be still in his employ or the employ of the Company.

To Elisha K. Root and Milton Joslin he gives 50 shares each, upon the same condition.

To J. Deane Alden he gives 25 shares, upon the same condition.

To his above employees he also gives devises of land upon condition.

To certain trustees he gives 2,500 shares of stock and certain real estate, for the purpose of founding a school for practical mechanics and engineering.

To each of his executors hereinafter appointed he gives 50 shares of stock, also devises of land upon condition.

Then comes the following residuary clause:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath and devise as follows: All the remaining stock of said Colt's Patent Fire-Arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies and in precisely the same ratable proportions."

He appoints his wife, and his friends, Richard D. Hubbard and Henry C. Deming, to be his executors.

To each of his executors, in compensation for services, in addition to the legacy and devise hereinbefore given, he gives one-quarter of one per cent. of the cash value of his estate.

The will is dated June 6, 1856.

(Record, pp. 55–61.)

The first codicil is dated Jan. 12, 1858, in which occur the following changes:

He increases the devise of land to his wife for life. The same with the others contained in the will to be in lieu of dower.

He revokes the annuity given in the will to his stepmother.

He revokes, "for reasons growing out of his late unbrotherly conduct," the 500 shares of stock given in his will to James B. Colt for life, remainder to his children, and in lieu thereof gives the 500 shares to the school.

He revokes the devises of land to his employees, and to his executors.

He gives J. Deane Alden, 50 shares of stock in lieu of 25 shares, subject to the same conditions named in the will.

He appoints his brother-in-law, R. W. H. Jarvis, executor in place of Henry C. Deming.

He revokes the legacy given to the eldest son of his brother Christopher, and in lieu thereof gives him one-fourth part of what he would have received if the legacy given to him had not been revoked.

(Record, pp. 61, 62.)

The second codicil is dated Feb. 2, 1859. In it—

He revokes the devise and legacy given to the school.

He gives to each of the children of James B. Colt a legacy of $100, and wholly revokes any and all other legacies heretofore at any time made to or for the use and benefit of said children.

He gives to the eldest son of Christopher $100, and revokes all legacies heretofore made in his favor, and he then gives to the other children of Christopher "the property, to wit 500 shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company which in and by said original will is bequeathed to my executors in trust for the use of the children of James B. Colt." This bequest is in trust for said children, and

is to be held in the same manner as the bequest in the will to the children of James B. The testator then says, "And I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil as and for my last will and testament."

Record, pp. 62, 63.

The plan of this will is clear and unmistakable. Before coming to the residuary clause the testator selected the objects of his bounty — his wife, his children, his brothers or their families, his employees, his executors, the charitable school. But he finds he will have remaining an indefinite residue of stock, and of other property. How many children he might have he could not tell, and, therefore, he could not estimate how much stock it would take to give each a specified legacy of 500 shares. Nor could he tell what his general estate would amount to at his decease. Not wishing to die intestate as to any property, the problem presented for him was, to find a way by which he could divide the whole of his estate, which he should have at the time of his decease, in the desired proportions among the objects of his bounty. He separated his estate into two classes — stock, and other property not specifically devised, and he wished to establish a principle, or rule of division which would divide his estate into the desired proportions at the time of his decease.

He adopts the very natural plan of dividing proportionately this indeterminate residue among those to whom he had given specified or primary legacies of stock or money. The primary legacies were to be increased by whatever the residuary estate might amount to, and thus the whole would be exhausted. The residuary estate is thus bound up in one common disposition with the primary legacies. Any notion of independence or separation between a primary legacy

and its accompanying share of the residuary estate annihilates the whole plan of the will, and is manifestly contrary to the intent of the testator. By the express language of the residuary clause the position of residuary legatee is made dependent upon first occupying the position of primary legatee. Only those answering to the description of primary legatees can share in the residuum. In *the mind of the testator* there never was but one legatee and one legacy — the primary.

Assume for a moment, as applicable to the will, the independence of the primary and residuary legacy, or the independent character of the primary and residuary legatee, as held by the Connecticut and Circuit courts, and whither does it lead?

The primary legacies to the wife are given upon condition of her release of dower. The primary legacy to James B. Colt is given on condition of his releasing all claims against the testator or the Company. The primary legacies to Samuel C. Colt and the children of Christopher are given on the condition of their arriving at the age of twenty-one. The primary legacies to his employees are given on condition of their being in the testator's employ or in the employ of the Company at the death of the testator.

Upon this theory of independence it follows that the primary legatees may refuse to conform to any of these conditions and still share in the residuum; each taking the full amount of residuum which went with his primary legacy, and also taking in the form of residuum a part of the very primary legacy which by lapsing would fall into it, and which the testator says expressly is given upon condition.

What shall we say of the reasonableness of a construction which would allow Mrs. Colt to share in the

residuum without release of dower, James B. Colt to share in it without releasing his claims against the testator or the Company, and would permit the employees to take a share of the residuary stock, though they were no longer in the employ of the company?

When the testator in the first codicil increases the devise of land to Mrs. Colt, he is careful to say that this with the other legacies and devises contained in the will shall be in lieu of dower.

When he increases J. Dean Alden's legacy, he is careful to make it subject to the conditions named in the will.

This proves that in the mind of the testator the primary and residuary shares in the estate were inseparable, that the residuary always followed the primary and was not independent of it, that a person must first answer to the description of primary legatee in order to share in the residuum, and that only by reason of taking as primary legatee could he take as residuary legatee.

See where this theory of independence conducts us: Suppose the primary legacies consisted of 5,000 shares of stock given upon various conditions to various legatees, suppose the residuum to consist of 5,000 shares; the legatees might refuse to comply with the conditions which would throw the 5,000 shares of primary legacies into the residuum, and then without complying with any condition they would take in the form of residuum the exact amount of their original primary and residuary legacies.

This demonstrates that the residuary clause in the testator's will signifies something more than a mere division of independent legacies among independent legatees. That it is a wrong construction to put upon

that clause, to say that its meaning is the same as if the names of the legatees had been written in the body of the clause. This is to ignore the plain language of the testator, when he says, "meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock." It is undeniable that by the clear import of the language used, as well as in accordance with the plain scheme of the will, that there is a connection or dependence between those who took the primary and those who took the residuary. We submit that in the mind of the testator his plan was that no one could share in the residuum who did not first take a primary legacy, and that those who took primary legacies should have them increased by a share in the residuum until the whole estate was exhausted.

It is clear that such is the scheme of the will, and now the question arises whether the testator intended to extend this same plan to his codicils.

To hold that he did not involves the assumption:

First, That the testator in the disposition of this immense estate abandoned in his codicils the simple and harmonious plan of his will, that he adopted one plan of disposition by the will and another plan in the codicils, thereby introducing inconsistencies, complications, and absurdities into the instrument as a whole, all of which we submit is most improbable, and therefore the last view to be taken by the Court, if any other construction is possible.

Second, It involves the assumption that the testator abandoned the scheme of his will without any language expressive of any such change, for in the codicils he never mentions or refers to the residuary stock, but designates the primary, which under the plan of the will stood as the representative of all that was

given. Surely if the testator had made such a radical change in his plan, he would have mentioned this plainly somewhere.

We submit that a critical examination of the codicils proves conclusively that the testator intended no change in the scheme of the will, but, on the contrary, they confirm and strengthen the original plan.

Take the revocation of the bequest to James B. Colt in the first codicil. The testator says:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company, given in the aforesaid will to James B. Colt, for life, remainder to his children; and in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

(Record, pp. 61, 62.)

Did the testator intend to revoke the residuary stock which went with the 500 shares, and give it over to the school, or did he intend that James B. should still take the residuary stock which originally appertained to the 500 shares given him in the will? We submit that in the mind of the testator, and according to the plan of his will, James B. Colt became no longer a primary legatee of stock, and therefore he could not share in the residuary, and the school became a primary legatee in his place, and therefore became by virtue of this entitled to share in the residuary. In no other way can you give the proper effect to the words of the residuary clause wherein the testator says "meaning that my residuary in said stock shall be shared by the same persons to whom I have

given specified legacies in stock." Under this plan the testator deemed it sufficient to designate the primary legacy. For it was the primary legatees who were to take the residuary.

But the intent is further shown by the fact that the testator here mentions the motive which called for the revocation. It was the unbrotherly conduct of James B. Is it to be credited that this unbrotherly conduct was measured by the 500 shares, and that it did not embrace the accompanying residue? Was he unbrotherly in the mind of the testator only to the extent of 500 shares, and not as to the indeterminate residue?

Is it conceivable that the testator, bearing in mind the expressed motive by which he was actuated, the plan of the will, the language of the residuary clause, the fact that he only designates the primary in the changes made by his codicils, still intended to have James B. take the residuary independent of the primary legacy, and the school the primary independent of the residuary?

In the will this legacy was given James B. on condition that he waive all claims against the testator or the Company. If he had taken under the will the 500 shares and its accompanying residuary, he must first have complied with this condition. Can it be said that the testator intended James B. to share in the residuary without giving any release at all?

His alienation from his brother grows stronger before the execution of the second codicil, for in that he cuts off his children also. The charitable bequests of three thousand shares for the school for mechanics and engineers are also revoked, thus throwing this stock into the residuum, and leaving it, together with the proportion of the residuary stock belonging to it, to be divided among the other legatees, and nearly

trebling the amount of each of the other residuary legacies. Can it be imagined for a moment that while he was so keenly sensitive to the unbrotherly conduct of the legatee as to be impelled thereby to the act of cutting off the legacies of stock to him and his children, he could possibly intend, in the same breath, to leave to his brother over 574 shares of this stock — an amount larger than the primary legacy of stock which he was taking from him?

It is admitted that the testator, in plain and unmistakable terms, cuts off this legatee's specific bequest of 500 shares of stock; which the codicil accordingly declares *he shall not have*. The Supreme Court of Connecticut in the case of Colt *vs.* Colt, while recognizing this, fall at the same time into the strange contradiction of giving him a portion of this very stock after all. They hold that the primary legacy is revoked, and thus thrown into the residuary, while its accompanying gift of the residuary is *not revoked*, so that he is to share in the latter augmented by his own, revoked, primary legacy; and the result is that he is to have a part of what the testator has declared he *shall not have*.

Take the legacy to J. Deane Alden.

The first codicil gives him "fifty shares" "in lieu of twenty-five shares named in said will."

(Record, p. 62.)

The testator had given his other employees mentioned in the will fifty shares each. Can it be doubted that he now desired to put Alden upon an equality with them? And that therefore he intended he should have a portion of the residuary corresponding to the fifty shares given him by the codicil, by which means alone such equality could be realized? Or are we to

say that the testator intended Alden to take the residuum on the twenty-five shares given him in the will, and no residuum on the fifty shares mentioned in the codicil?

We say that the testator under the plan of his will did not deem it necessary to say anything more to carry to Alden the residuum on fifty shares. He regarded the will and codicil as composing the instrument, and as working a division of the residue of the stock among those to whom primary legacies were given, and in the same ratable proportions in which stock was given to them by the provisions of the will and codicils taken together.

Take the next paragraph, in which Jarvis is appointed executor in place of Deming, who was named in the will (Record, p. 62). It is manifest that the testator intended Jarvis to take the primary and residuary legacy given to Deming as executor in the will, and yet the testator specifically gives him nothing. The testator uses the expression in the will, to *each* of my executors *hereinafter* appointed (Record, p. 60), but we find the executor hereinafter appointed in the will was Deming, and not Jarvis. It is only by going beyond the will, and construing the will and codicils together as one instrument, that hereinafter can include Jarvis. We submit that the same latitude of construction should be given the word "hereinbefore" contained in the will. Taking the will and codicils together as they were left by the testator at the time of his death, we say that he intended that the words "hereinafter appointed" should mean such persons as it should be found in the whole instrument as finally left by him were appointed executors, and that the words "hereinbefore given" in the residuary clause meant such persons as it should be found in the will

and codicils were left primary legacies, and were holders of the primary bequests, which the testator had constituted the basis of the division of his stock in the Company.

Observe also the next provision of the first codicil in regard to the eldest son of Christopher Colt. The testator here says, "I also revoke and cancel *the leg-* "*acy* given in said original will to the children of my "late brother, Christopher Colt, so far as the eldest "son of my said brother is concerned, and so far "only, and, *in lieu thereof*, I give and bequeath to "said oldest son one-fourth part of what he would "have received if *the legacy* to him in said original "will had not been revoked."

(Record, p. 62.)

The testator says, "*I revoke and cancel the legacy!*" As held by the Court in Colt *vs.* Colt, the will contained in each case *two* legacies, one of a specified amount of stock, and the other of a proportion of the residue.

But the testator says, "I revoke and cancel *the* legacy." What does he mean by that? How are you to determine that question? Is it within the limits of possibility to determine it upon the theory that he revokes one legacy and not the other? If so, you must decide to which he refers as "*the* legacy."

It is an easy matter to dispose of, if you look at it as the testator did, and regard the designation of a primary legacy as sufficient to carry with it the residuary stock which belonged to it, and consequently the revocation of *the* primary legacy as revoking the gift of its corresponding residuary stock.

Adopt this construction, and you arrive at a plain and reasonable result.

Adopt any other, and where does it lead?

Does the clause then operate upon the whole stock given to the legatee by the will, and award to him in lieu thereof, one-fourth part as much? The mind naturally receives this impression and rebels against any other.

This shows conclusively that the testator used this expression, "*the legacy*," with the peculiar meaning we have indicated. He mentions the primary legacy as the representative of the whole.

Now apply the opposite construction and say that the clause in the codicil operates upon the primary legacy merely, and not upon the whole, according to the reasoning in Colt *vs.* Colt. Then the legacy of that portion is *revoked* and the gift of the residuary stock is *unrevoked*. The gift then of the residuary stock being unrevoked, the legatee would get that to begin with. Then in place of that which is revoked, he would get what is given by the codicil and which is directed to be "in lieu thereof." And what is this? *One-fourth part of all he would have received under the original will, if "the legacy" had not been revoked.*

Thus then he would take *the whole of his original proportion of the residuary stock*, because the gift of that is unrevoked. He would get also one-fourth of the original primary legacy and *one-fourth of the residuary stock over again*, as constituting "one-fourth part of what he would have received if the legacy to him in said original will had not been revoked." This would be a manifest absurdity. The nature of this bequest in the codicil shows plainly enough what it was to be substituted for, viz., the whole amount given him by the will, and in lieu of which he was to have one-quarter of that amount. It

would be idle to undertake to convince a rational mind that the testator had any other idea. Could anything more clearly demonstrate the meaning of the testator in these codicils to dispose of the whole amount given to a legatee by designating the primary legacy, which governed and carried, according to his intention, the proportion of the residuary united with it.

We now come to the second codicil.

If anything more were needed to settle the question of the meaning attached by the testator to this designation of the primary legacy in each case as used in the codicils, it might be found in the language of the revocation of the gifts to trustees for the establishment of a school for the education of practical mechanics and engineers, as contained in the second codicil. He there says, "I hereby cancel and revoke "*the devise and legacy* heretofore made in and by "said original will and codicil, to the Governor of "the State of Connecticut and others as trustees," etc. He adds, "my design is to abolish *said devise and* "*bequest.*"

(Record, p. 62.)

The original will gave these trustees certain land and 2,500 shares of stock. The residuary bequest, of course, gave them a corresponding proportion of the residuary stock. By the first codicil a bequest of stock to James B. Colt for life with remainder over is revoked, and that is also given to them.

(Record, pp. 58, 61, 62.)

And yet the testator in the second codicil merely revokes "*the devise and legacy*" to them in the "*original will and codicil.*"

In using this expression in the singular number, he of course pointed to the *primary* devise and legacy in the original will and codicil. But what was to become of the others?

To say that he meant to leave them unrevoked would be so plainly contrary to the testator's meaning that that proposition is inadmissible. He says his intention is "to *abolish said devise and bequest*," and he considers that he has accomplished this by revoking "*the* devise and legacy."

Then the intention, as shown by the language of the will, is *to revoke them all*, is it not; and the language bears that construction and has that effect. If so, it establishes the fact that the testator in the codicils used this mode of designating the legacies in the will with the meaning and design which we refer to, viz: that by designating and dealing with the primary "legacy" he made the disposition in each case operative upon the residuary stock which attached to it.

In the next paragraph of the second codicil (Record, pp. 62, 63), the testator proceeds to give each of the children of James B. Colt a legacy of $100, and he then cancels and wholly revokes any and all other legacies and devises heretofore at any time made, to or for the use and benefit of said children, or either of them. Stress is laid upon the fact that this is broader than the revocation of James B. in the first codicil (Record, pp. 61, 62), that here all legacies are revoked, while there it was only the legacy of 500 shares. The natural explanation of this difference in language is this: the testator in his will had left two primary legacies of 500 shares each to the family of his brother, one of 500 shares to the father for life, remainder to his children, another of 500 shares to

the children in trust (Record, p. 56). At the time of penning the first codicil, owing to what he regarded as the unbrotherly conduct of his brother, he determined to cut off James B. and his children to the extent of the first legacy of 500 shares, given to him for life, remainder to his children, with the residuary which went with it, and to give this to the school. But he would at this time cut off the children of James B. only in part. He would still leave to the children (though nothing to the father) one-half the interest they took under the will. As two legacies were left to the family in the will, it was necessary in the first codicil for the testator to point out specifically which legacy he intended to revoke, and therefore he refers specifically to it. Otherwise the revocation might cover the other primary legacy of 500, which he still desired the children to have. Between the time of the first and second codicils his alienation from his brother's family had grown stronger, and he now proposes to cut off the family entirely. It was no longer necessary to refer to any particular primary legacy, that another primary legacy might not be included. He had now finished with the family of James B., and so he naturally adopts the general and sweeping language which is found.

This is the natural explanation of the difference in the wording in the changes made in the first and second codicils in respect to the family of James B., and considering the scheme of the will, and the plan adopted by the testator of only referring to the primary legacy in the other changes made in the codicils, we submit that no rational argument against the construction we put upon the will and codicils can be founded upon it.

The testator now proceeds in the following and last paragraph of the second codicil to give over to the

children of Christopher in trust (except the elder son), the property, to wit: 500 shares of stock which he had just taken away from the children of James B. Here again it was necessary for him to specify which primary legacy he intended, for he had given in the will two primary legacies of 500 shares each to the children of James B., in the manner we have just stated. Here we think Mr. Justice Blatchford fell into an error in his opinion, when he says, "no other legacy of 500 shares was given to the children of James B. in the original will."

(Record, p. 246).

He therefore designates which primary legacy the children of Christopher are to take, viz.: the trust legacy. There having been two primary legacies (one in remainder and one in trust) given to the children of James B. in the will, the fact that the testator here designates only the primary, as he does in the other changes made in the codicils, furnishes no ground for an argument that he did not here intend the residuary to go with it, simply because he revokes all legacies given to the children of James B., and then gives us only one primary. If he had given us the whole interest left to the children of James B. in the will, which was an interest in 1,000 shares of stock with its accompanying residuary, he would have given us more than he intended. What he meant was to give the children of Christopher the trust legacy mentioned in the will and all that went with it.

We submit that the foregoing examination proves beyond question what the scheme of this testator was in the disposition of his estate. By the plan of the will the residuary estate was to follow the primary bequests of stock or money in precisely the same ratable proportions.

Having adopted this plan, the testator considered that the arrangement of the will presented a simple, concise, and easy method of making any changes which he might desire to effect by codicil — since the residuary stock inseparably followed the primary in precisely the same ratable proportions.

By revoking a primary legacy, the revocation would include the corresponding proportions of the residuary stock united with it. By increasing or diminishing a primary legacy, a similar change would be effected as to the residuary stock which was to follow it. By revoking a primary legacy to one legatee, and giving it over to another, he would similarly transfer the whole. By substituting other beneficiaries in a legacy of stock given to trustees, he would, of course, transfer the benefit of the bequest to the new *cestuis*, without disturbing the gift to the trustees.

Therefore, in the codicils, the testator *never mentions or refers to the residuary stock*, but always designates the *primary legacy*, which, under the plan of the will, stood as the representative of all that was given.

This is the key to the construction of this will, and the use of it renders the whole instrument plain, simple, consistent, and easily to be understood. Any other construction makes it unreasonable, inconsistent, inextricably complicated and absurd.

How can you reconcile a construction which would permit the legatees in the will whose primary legacies are given upon condition, to share in the residuum without taking their primary legacies and conforming to the conditions, and which in the codicils would give the primary legacy to one legatee and the residuary to another, with the closing words of the residuary clause wherein the testator says, "meaning that my residuary estate in said stock shall be shared

by the same persons to whom I have given specified legacies in stock and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies and in precisely the same ratable proportions."

(Record, p. 60.)

The mind of the defendant Gov. Hubbard, revolts against the construction adopted by the Supreme Court of Connecticut in Colt *vs.* Colt as being diametrically opposed to the meaning of the will. "That decision" he says in his letter to Mrs. T. G. Colt (alluding to the judgment sustaining James B. Colt's claim to the residuary stock, Record, p. 90), "involves this" (the decision against our claim) "as a logical necessity, though the Court did not then know it. This decision reduces that to a logical absurdity"; and he adds, "to my mind two things are as certain as that two and two makes four. First, that James Colt was not entitled to a share under the will; and next, that the very share which the Court has given to him in the residuum belongs to your children. Fire will not burn out this opinion. I defy any person not affected with judicial blindness, to come to any other conclusion upon any natural rule of interpretation. But after the first error was made, the second came as a matter of inevitable necessity."

In the construction of wills, each case must stand by itself. Each case has its own peculiar set of circumstances surrounding it, and its own peculiar language, phraseology, and testamentary scheme to be considered in the construction. Previously decided cases can be of little assistance, except so far as to point out settled principles of construction. A slight variance may make a wide difference in the interpre-

tation to be adopted. We do not find in any of these cases the distinctive features in the testamentary instrument, which we have pointed out in the will of Samuel Colt. Here is an expressed motive for cutting off the legacies to James B. Colt and his children, which is directly inconsistent with the result reached by any other construction than the one we adopt. The codicils are here drawn in such a way as to interweave their matter with the provisions of the original will. A republication in the last codicil describes the original will, as having been "altered, changed and modified," by the codicils, and the testator re-establishes "said original will as altered, changed and modified by this, and the previous codicil as and for my last will and testament."

There are no reported cases, the elements of which conform to those presented here. We are asking only the application of a settled rule in the construction of wills when we claim that the case at bar should be considered by itself — in view of its own peculiar elements — and decided upon the presentation made by this very will and its codicils — and that the intention of the testator as indicated thereby and by the circumstances therein recited and referred to, should be carried out.

In the cases cited by the defendants it will be observed that the courts say that legacies are presumed to be independent *unless a contrary intent appears.* The rule of construction they invoke does not apply as against a contrary intent. Here, we submit, the fact of the testator's meaning and intention is not at all a matter of conjecture.

It is actually and undeniably demonstrated by the terms in which the will is drawn. The will and codicils are to be read together as one instrument, and in

such a manner as to render it a consistent one, if it can be done. If the interpretation referred to is the only one which will make it consistent and reasonable, it must necessarily be adopted, according to the well established rules of construction.

Whatever may be true of other tribunals, this Court has held repeatedly that no technical rule of construction adopted in other cases shall be permitted to defeat the clear intent of the testator.

In Smith *vs.* Bell, 6 Peters, 65, 75, 79, Chief Justice Marshall says:

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." . .

"Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly, 3 Wils. 141, 'that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the Court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'"

In *Clarke* vs. *Boorman's Executors* 18 Wall. 493, Mr. Justice Miller, delivering the opinion, says: "Of

all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of legal technical terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

The Supreme Court cite this entire passage in the recent case of

Giles *vs.* Little, 104 U. S. 291, 294.

Here the Court also say (p. 294):

"No man unversed in technical rules of construction can, it seems to us, read this will without coming to this conclusion. To hold otherwise would be to suppose the testator in drafting his will, was governed by abstruse rules of law in regard to the effect of his expressions, of which, it is probable he never heard and had not the slightest conception."

In Hoppock *vs.* Tucker, 59 N. Y. 202, Church, C. J., says:

"But there is no rule of law that gives to the terms an inflexible intent (Knight *vs.* Gould, 2 Myl. & K. 295). An intent inferable from the language of a particular clause may be qualified or changed by other portions of the will evincing a different intent. The substance and intent rather than words

are to control (L. R. 8 Eq. Cas. 52–58). The intention of the testator is the first and great object of inquiry, and to this object technical rules, to a certain extent, are made subservient."

In that case it was held that while the clause alone would be construed as a bequest to individuals, yet it appeared from the general scheme of the will that they were to take as a class.

"The construction of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within the 'four corners of the instrument.'"

1 Redfield on Wills, *435.
Hoxie *vs.* Hoxie, 7 Paige, 187–192.

"The Court will place themselves as far as practicable in the position of the testator, and give effect to his leading purpose and intention, as indicated by the words of the will, construed with reference to all attending circumstances."

1 Redfield on Wills, *437.
Malcolm *vs.* Malcolm, 3 Cush. 472.
Gulliver *vs.* Poyntz, 3 Wilson, 141.

II.

THE BEQUEST FOR THE BENEFIT OF THE COMPLAINANTS IN THE WILL AND SECOND CODICIL.

The will and codicils, upon a proper construction thereof, bequeath to our trustees 500 shares of stock and a proportion of the residuary stock corresponding thereto, upon an active trust for our benefit.

The original will contains a bequest to trustees for the issue of James B. Colt, as follows:

"I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Patent Fire-Arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue in equal proportions, as an absolute estate."

See Will (Record, p. 56.)

The second codicil provides as follows:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them. I give to the eldest son of my brother Christopher Colt a legacy of one hundred dollars and

no more, and all legacies heretofore made in his favor are canceled and revoked; and I hereby give, bequeath and devise to the other children of my said brother (said eldest son not being included herein) the property, to wit: five hundred shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner, and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil as and for my last will and testament."

"In witness whereof I have hereunto set my hand and seal, etc."

See Will (Record, pp. 62–3.)

The Supreme Court of Connecticut in *Colt* vs. *Colt*, 33 Conn., p. 280, purport to decide against the claim of the complainants to a proportion of the residuary stock under these provisions of the will and codicils, — the Court holding that by the will the residuary stock "was given to the *persons* and *parties* to whom stock was *thereinbefore given*."

And that the bequest to the executors in the will as trustee was revoked by the codicil, and that a new bequest of 500 shares of stock only is by the codicil given to the children of Christopher; and that therefore neither the children of Christopher nor their said trustees were among the persons and parties to whom stock was by the will "thereinbefore given."

In a subsequent part of our Brief, and under its

proper head, we demonstrate, as we think, that this decision does not operate as a bar or estoppel of our claims here as constituting them *res adjudicata*, as there was a defect of parties in that case.

We therefore refer to that decision here only by way of discussing it so far as it may be claimed to be a precedent and as setting up a rule of law — relying upon the other division of our brief as a complete answer upon the point of *res adjudicata*.

Even ascribing to the words "*hereinbefore given*" the meaning attached to them by the Connecticut Court, still, we submit they erred in their decision.

We will consider the subject in three aspects:

1. Looking at the bequest as one given *directly* to the legatees; which is the way it seems to have been regarded by the Connecticut Court, although, as we think incorrectly.

2. As a bequest to trustees for the benefit of the *cestuis* — the trustees and not the *cestuis* taking the legal title.

3. That the terms of the codicil do not in effect *revoke* the bequest in the will — but revoke only so much of it as makes the children of James B. the beneficiaries of the property given.

1. As a Bequest Directly to Legatees.

We claim that the will gives the legacy of stock to the trustees who take the legal title, and that the gift to the trustees is never revoked, but remains given to them — the *cestuis* merely being changed by the codicil. This point is hereafter considered.

The language used by the testator seems to us, to to show that he bore in mind constantly that the pro-

perty was given in trust. But looking at the matter in the light suggested by our opponents, and assuming for the sake of the argument that the gift is dealt with in the codicil as a direct one to the legatees, we still find that THE CHILDREN OF CHRISTOPHER COLT ARE BY THE CODICIL SUBSTITUTED LEGATEES OF THE LEGACY THERETOFORE GIVEN TO THE CHILDREN OF JAMES B.

Where a legacy is by codicil given to a legatee *instead* or *in place* of an original legacy in the will; or where a will gives a bequest to a certain legatee and the testator by codicil revokes that disposition of it, and gives over the *same* legacy to another legatee — this is in either case *substitution*.

As instances of the first kind, see

Duncan *vs.* Duncan, 27 Beavan, 392.

In which it appeared that the testator gave legacies to his nieces J. D. and L. C., and also bequeathed to them any sum due him from C. M. not exceeding £500, and directed as to any residue, that if his estate should be deficient, the legacies, *except that of the debt from C. M.*, should abate proportionally, and if more than sufficient should be increased proportionally. Afterwards the testator collected the debt from C. M., and by a codicil "in the place of the said intended legacy," gave the nieces the sum of £500. It was held that this was a substitution. The Court says: "This is exactly *the same legacy*," and that it would not increase with the other legacies, although there was a surplus.

Shaftesbury *vs.* Marlborough, 7 Sim. 237.
Bristow *vs.* Bristow, 5 Beav. 289.
Fisher *vs.* Brierly, 30 Beav. 267.

Also *Cooper* vs. *Day*, 3 Merivale, 154, where the will gave to trustees for the testator's daughter £4,000, and directed that the legacy duty in respect thereto be paid out of the residue, and a first codicil recites the bequest, and then says: "I *revoke* the said gift of £4,000," and give to the trustees £5,000, upon the same trusts, etc. And a second codicil, reciting the last named legacy, and that the testator was desirous of increasing the sum to £6,000, says: "Now I do *revoke* the said gift of £5,000, and give and bequeath in lieu thereof" (to said trustees) "the legacy or sum of £6,000, upon the same trusts, &c." It was held that this was not a revocation but a *substitution* in each instance, and, therefore, exempt from legacy duty.

See also Martin *vs.* Drinkwater, 2 Beavan, 215.
Johnston *vs.* The Earl of Harrowby, 1 DeG. F. & Jones, 183.

And as instances of the second kind referred to, where a gift to one legatee in the will is revoked by the codicil, and the *same* legacy is given over to another,

See Alsop's Appeal, 9 Penn. St., Rep. 374.

In this case the will of the testator, after making various bequests, then provides that if his property should exceed $168,000, the surplus should be divided *pro rata* "among the different legatees." The testator made several codicils and gave additional legacies to other legatees. He also in a codicil recites the death of one of the legatees named, R. A. Eyre, and bequeaths that legacy to "the youngest daughter of my (his) friend and neighbor, J. Sergeant."

A codicil also "*rescinds*" a legacy given in the will to George Shipman, and directs that legacy to be added to a bequest made to Gustavus Cleeman.

These gifts by codicils to Sergeant and Cleeman are held to be substitutionary, and they are substituted legatees thereof.

See also, for a statement of the same principle, Chatteris *vs.* Young, 6 Madd. Ch. R. 30.

In that case the testator gave to trustees for his daughter by his will £20,000 for her separate use, free of legacy duty. She died in his life-time. He then made a codicil to his will noticing her death and the lapse of the legacy, and instead thereof gave her husband £20,000 without saying anything about the legacy duty. The Court said that it was an original legacy, and therefore not free from legacy duty by force of the provisions of the will, but added; "If he "(the testator) had said I give to him (the husband) "*the same* legacy or the *same sum*, it would have ad- "mitted of different consideration."

Seacroft *vs.* Maynard, 3 Bro. C. C. [233.]

Here the testator gave several legacies by his will, among them one of £1,000, to the Hospital in the County of *Leicester*. These legacies were charged on his real estate. By codicil he *revoked* this legacy of £1,000 to said Hospital, and instead thereof gave the sum of £500 to another hospital, viz.: the Hospital of the County of Nottingham, without mentioning any particular fund out of which it was to be paid. Held to be a substitution, and therefore payable out of his real estate.

See also Hayes *vs.* Hayes, 21 N. J. Ch. R. 265–9.

In the light of these cases it cannot be with fairness contended that the gift over by the codicil to the

children of Christopher Colt of the primary legacy given by the will to the children of James B., is not a *substitution* as distinguished from an *original gift*. The property, the form of the gift, the mode of its administration by the trustees, — all the characteristics, limitations and peculiarities of the original gift are preserved and carried over to the substituted legatees. And to place it beyond possible question, it is declared to be the *same* property — "THE PROPERTY to-wit: 500 shares, etc., . . . WHICH in and by said *original* will is bequeathed to my executors in trust for the use of the children of James B. Colt." This, then, is the *same* legacy, and as such it passes to the substituted legatees.

Note also, that the use of the *words of revocation* in the codicil are not inconsistent with this view. In almost all the cases of substitution the words "*I revoke*," or equivalent words, are used in withdrawing the original legacy.

It is also to be observed that the use of the words "500 shares, etc.," which are claimed to limit the gift to the primary legacy, are not in conflict with this view.

It is of the primary legacy we are speaking, and of the children of Christopher as being substituted thereto as legatees, and the more accurately it is described and identified as the same gift which appears in the will, the more indisputable the fact of its being a substitution, in the view of the case which we are here taking.

Now as to the effect of this substitution. In *Redfield on Wills*, * 447, Vol. 2, we find that "substitutionary legacies — that is when legacies are subsequently given to come in the place of others given

before, either in a former will or when the substitutionary legacies are given in a codicil executed at a later date than the instrument by which the legacies were given in the first instance—in all cases such substitutionary legacies, unless there is something in the terms used or the circumstances attending the substitution to the contrary, will have all the incidents, conditions and limitations attaching to the original legacies."

See also *Williams on Executors*, 8th Ed., p. 1301, Vol. 1, to the same effect.

In the case of *Chatteris* vs. *Young*, 6 Madd. Ch. Rep. 30, above cited, while holding that the gift by codicil to the husband of a like amount as had been given to his wife by a bequest in the will which had lapsed by her death, was not a substituted legacy, the Vice-Chancellor says, "Where by codicil a legacy is substituted for a legacy in a will it will have the same qualities, but where the legacy is said to be given by a codicil because a will had failed, this is not substitution but motion. . . . If he had said, I give to him the *same* legacy, or the *same* sum, it would have admitted of a different consideration, mere substitution being *prima facie* attended with the same incidents."

See also Johnson *vs.* Earl of Harrowby, 1 De G. F. and J. 183: above cited.

And it is upon this principle that all the cases before referred to are decided.

Now the testator, Samuel Colt, does not in the clause of the will relating to the residuary stock give it to the parties by name, or by any designation of them as individuals. He gives it to them *as* persons and parties to whom primary legacies of stock were

given. It was *because* of their being legatees of primary legacies and in that character that they were given the residue. He wished to give to the primary legatees *all* the stock he might have at his death. But he could not do this and fix the proportions expediently in any other way, because he did not know how much stock he would then have. If he could have known this, doubtless he would have designated the number of shares to each in their respective legacies; and then a revocation or substitution of legatees by codicil would have occasioned no such discussion as that which has here arisen. But he seeks to accomplish the same result by the mode adopted. Therefore he gives to the class composed of these legatees the rest of his stock *as being those* to whom he had given the primary legacies. He does not name them, or designate them in any other way. He says: "All the remaining stock . . . *shall be divided amongst* the several persons and parties to whom I have hereinbefore given legacies of stock in the ratio and proportion in which said legacies of stock are hereinbefore given." And to make this meaning certain, he says in the same connection "meaning that my residuary estate in said stock shall be *shared* by the same persons to whom I have given specified legacies in stock and in precisely the same ratable proportions." Here he gives a definition of his meaning. It is *as* legatees of the previous bequests of stock, and as holding that character, that he describes the class who are to share the residuary.

This is what the will actually says. Why did not the testator designate these parties by name? He might have done this easily. He chose the other course. Effect must be given to all that he says and all that he does. The fact that he adopts the designation referred to instead of reciting the individual

names, is clear evidence of his meaning and intention; and, as we have seen, he has also added his own construction and definition of his meaning. It is because of this *coincidence* of their being the recipients of the primary legacies, that the residuary is also given the same direction; and it is so expressed.

He forms of them a class. This is plainly the decision of the Connecticut Court; for it is held that a revoked bequest of stock and even of residuary stock falls into and augments the common fund of residuary stock. If it were not given them as a class this would not be so. There is a class then to whom the residuary stock is given, and the coincidence of its members being those who were to take primary legacies of stock is made the basis of its constitution, and a reference thereto is adopted as the mode and means of describing and constituting it. This is not mere conjecture. It is expression clearly indicating intention. We submit that in a case like this a primary bequest taken from one and given over to a substituted legatee (and especially when the codicil also takes from the original legatee *eo instanti* the corresponding residuary stock) should be held to carry with it its corresponding residuary stock to the substituted legatee. The residuary is certainly given in the will as incidental to and with the gift of the primary. It was *as being* so coincident that the original legatee of the primary legacy took the corresponding residuary, and when a new party is made to stand exactly in his place as legatee of that legacy (the original legatee's interest in the residuary being also terminated), we claim that they should be held to take what the original legatee, whose place they occupy, would have taken.

It is true that the Vice-Chancellor, in "*In re Gibson's Trusts, 2 Johnson & Hemmings, p. 663*," cited

by the defendants, says, referring to the cases there cited upon the question of substitution and its effect: "I am not aware that the rule which these cases establish has ever been extended to that length"; and it was decided "*In re More's Trusts* (10 Hare, 171, 176) by Lord Justice Turner, when Vice-Chancellor, that it cannot be applied to a case where, as here, its application would alter the limitations of property."

In the Gibson case, however, the gift of the residuary was to *individuals* and not to a *class*, and it was so expressly held. Our case presents a question which that case did not, viz.: whether where the residuary gift is by the will to a class to be composed of those who are made primary legatees, the substitution of a legatee as a primary legatee by the codicil would bring such substituted party into the class — *the membership of the original legatees in the class* being by the terms of the residuary clause made incidental to the fact of their having been made primary legatees. Besides, under the ruling in *Chatteris* vs. *Young* 6 Madd. Ch. Rep. 30, above cited, the doctrine of substitution would not apply in a case like that of "*In re Gibson*," where there was a lapse of the original legacy by the death of the original legatee. The head note of that case says: "Where by a codicil a legacy is substituted for a legacy in a will, it will have the same qualities: but where the legacy is said to be given by a codicil *because a will has failed*, this is not substitution but motion." The decision "*In re Gibson*," that the rule of substitution would not there apply, could be sustained upon the ground just stated. But that case does not furnish an authority for a case where the primary legatees are constituted a class to take the residuary, as in the present case, in pursuance of a scheme of the testator to effect a complete division of his property by this plan.

Moreover, upon referring to the only case cited as sustaining the Vice-Chancellor's ruling, "*In re More's Trusts*," we find that to have been, not a case of *substitution*, but of an *additional* legacy; and one where the Court thought it was plainly against the testator's intention to have it so affected by a *previous* legacy in the will as to change an *absolute* gift of £600 three per cent. consols, into an equitable interest for life in a trust thereof, with remainder over to his sisters, as in the previous bequest, simply because the testator had given it to him in addition to what he had before given him.

Here was attempt not to establish that the additional gift would carry with it some augmentation or advantage as an incident of the former one, but to cut down an absolute additional gift because there was a former gift of a limited nature. As it is expressed in *Williams on Executors*, Vol. 1, p. 1301 (8 Ed.): "So added legacies shall *generally speaking* be subject to the same conditions and incidents as those to which they are added. But this is not a universal rule, and it is only when the subject of the first gift is given absolutely or made defeasible, that the second gift has been held to be given on similar terms. For the doctrine has never extended so far as to alter an absolute second gift into an estate for life only and then to the party who was named in the first gift to take after that legatee's death."

It is easy to see that in the case of *additional* legacies it might sometimes happen that the rule would not be applicable because the subject of the legacy is not in such cases the *same* as that of the previous legacy, other and different property being given which might plainly be intended to be differently held, used, limited and enjoyed. But in the case of a *substituted* legacy this could hardly occur, as the subject of the

gift is identically the same, and would naturally go to the substituted legatee in the same manner and with the same incidents and qualities. We submit that the case referred to standing alone, would not afford a solid support to the opinion of the Vice-Chancellor in "*In re Gibson*," and that at any rate in a case like the one at bar, where the gift under the testator's plan is to a *class*, the ruling in the latter case does not apply.

It is certainly as an incident to their being the original legatees of the primary legacy, that the original legatees come into the class to take the residuary according to the express views and intent of the testator. The substituted legatees are now the legatees of that primary legacy, standing exactly in the place of the former, and thus incidentally coming into the same class by this substitution.

To *substitute* is of course *to put in the place of*. Suppose that the testator had literally said in the codicil, after revoking the gift to the children of James B. and giving the primary legacy to the children of Christopher, "And I hereby expressly substitute the children of Christopher for and put them in the place of the children of James B., and they shall stand in their place as the legatees of that legacy," or had said, "And I hereby expressly substitute the legacy of said 500 shares to the children of Christopher for and put it in the place of, and it shall stand in the place of the bequest thereof in the will to the children of James B." Could there be any doubt in that case of the substituted legatees being, by the operation of this direction, and by legal intendment under it, placed in and ranking among the class of those described in the residuary clause as "the same persons to whom I have given specified legacies in stock," or of "the

persons and parties to whom I have hereinbefore given legacies of stock"?

And yet this is precisely what the codicil does, just as effectually as though it were literally expressed. The legacy given by it is substituted for the other, and the legatees, it seems, are substituted legatees thereof in place of the original legatees, and nothing further could be effected in that direction by any form of expression. "*Expressio eorum quæ tacite insient non operatur*." In other words, the residuary clause of the will gives stock to those "to whom I have hereinbefore given legacies of stock." A codicil provides that in the place of one of those to whom legacies of stock had been so given, another shall stand, and shall be in legal intendment that legatee by substitution.

BUT WITHOUT REFERENCE TO ANY QUESTION AS TO WHETHER THIS IS AN ORIGINAL OR SUBSTITUTED LEGACY, THE GIFT FOR OUR BENEFIT IS OF IDENTICALLY THE SAME PROPERTY GIVEN IN THE WILL FOR THE BENEFIT OF THE CHILDREN OF JAMES B. COLT.

It will be remarked that the testator here absolutely revokes the gift to the children of James B. of their beneficial interest *in the whole stock given by the will, both the primary and its corresponding residuary*, and, at the same time and by the same continuous act, substitutes the children of Christopher as *cestuis*. Now, what was to become of the residuary stock, if it was not to go to the substituted beneficiary legatees? We have seen that it exceeded in amount the primary legacy, and was, therefore, the more important to be considered. The subject in the mind of the testator at the time of writing was that of the entire gift of stock beneficially given by the will to the children of James B. This is absolutely shown by the terms of the revocation of their interest. We submit that the

words immediately following which substitute the children of Christopher in their place, must be taken to refer to and cover the same subject.

In the case of James B. Colt, it was contended that the omission of the testator to revoke in terms anything more than the primary legacy, must be taken as showing that he intended to leave to that legatee the accompanying residuary stock. It was relied upon, as a strong point, that a definite disposition had been made of that residuary stock, which the testator, it was said, did not in terms disturb (32 Conn., p. 47). But in the present case, the testator absolutely revokes the gift of the beneficial interest *in the entire stock*, and adds at the same moment, and, as it were, by the same sweep of the pen, the substitution of the children of Christopher. The construction adopted must be that which coincides with the theory that he intended to make a definite disposition of the whole, and not with the theory that he intended to leave a large part of it unnoticed. Would it be a construction consistent with reason to suppose that he sat down and revoked the beneficial interest in the whole of this stock, and then, by the added words, effected a disposition of only a minor part of it to those who were substituted, and designedly left the major portion without a syllable expressing his will in regard to it? And it is still more difficult (following the reasoning in Colt *vs.* Colt) to suppose that he intended to throw it into the residuum and increase the share, among others, of James B., whose "*unbrotherly conduct*" had moved him to withdraw the gift from his children.

"An intention in the testator to be consistent with himself, is always assumed as a cardinal point in construction."

Morrell *vs.* Sutton, 1 Phillips, Ch. Rep., p. 551.

We think it is not stating it too strongly to say that it is simply impossible to believe that the testator had any other idea or design than that of withdrawing the beneficial gift of the whole stock from the children of James B., and of substituting in their place the children of Christopher, as the recipients of what he so withdrew from the former.

And that this is the legal effect of the provision is further made manifest by an examination of the wording employed.

It will be observed that the language used in the codicil is: "I hereby give and devise to the other "children of my said brother (said eldest son not be- "ing included herein) *the property*, to wit: five "hundred shares of the stock of the Colt's Patent "Fire-Arms Manufacturing Company, which in and "by said original will is bequeathed to my executors "in trust for the use of the children of said James B. "Colt, etc."

Now *did* that 500 shares comprise "*the property*" given in the original will for the benefit of those children? Or was "the property" so given constituted *of the 500 shares and the residuary stock belonging with them?*

Yet the testator describes the subject of the bequest as "*the property*" given by the will. It is impossible here to escape the testator's meaning. The 500 shares are mentioned merely for the purpose of identification. They carry the residuary stock with them; otherwise they would not constitute "the property" given by the will. Here, then, is a direct definition and explanation given by the testator of his peculiar meaning in the use of this mode of expression in his codicils.

But the *actual effect* of *this language*, apart from that consideration, is to give the residuary stock along

with the 500 shares for the benefit of Christopher's children. The testator gives for this purpose at all events "*the property*" . . . . "which in and by said original will is bequeathed, etc." The words "to-wit, five hundred shares, etc.," are used parenthetically. The governing words are "the property, etc." If the codicil does not give the 500 shares and the residuary stock belonging with it, then it does not give "*the property*" given by the will, and so contradicts itself. If the parenthetical reference has any different meaning from what we give it, there would then be a patent ambiguity in the description of the legacy. In the first place, the whole is to be read and construed in such a manner as to make it consistent and unambiguous if possible. This can readily be done if we ascribe to the mode adopted here in designating the legacy the peculiar meaning which the testator, as we have shown, everywhere attaches to it in the codicils But if, on the other hand, it is claimed that an ambiguity actually exists in the description, then we submit that the words "to-wit, five hundred shares, etc.," are to give way to the other comprehensive words describing what the testator gives us.

The testator gives us "the property," which "*is bequeathed*" by the original will. There is no escaping that and no taking it back. If the words "the five hundred shares, etc.," can be considered as having any different meaning from that which we have pointed out they are then words of false description, as they do not, if regarded in that sense, correctly describe *the property* "which in and by said original will *is bequeathed*."

Now the rule of law in such cases is that the words of false description shall be rejected, where there is a sufficient description to designate what the testator meant. "*Falsa demonstratio non nocet.*"

Winkley *vs.* Kaime, 32 N. H. 268.

See *Williams on Executors*, Vol. II., ft. p. 1201, 6th Am. Ed.

"Where the intention of the testator is plain a mis-
"take in his calculations shall not defeat that intention.
"Thus in Milner *vs.* Milner (1 *Ves. Sr.* 106), Sir W.
"Milner bequeathed a legacy in this manner: 'I give
"my daughter Mary £3500 which, with £6000 she is
"entitled to by my marriage settlement, and £500 from
"her father-in-law, make up £10,000, which I design
"for her fortune.' In fact she was entitled only to
"£5000 by the settlement, and Lord Hardwicke held
"that she was entitled to have £4500 under the will.

"See also Ousley *vs.* Anstruther,
10 Beav. 459.
"Read *vs.* Strangways, 14 Beav. 139.

"So in *Trevor* vs. *Trevor*, 5 Russ. 24, a testator
"gave his wife an annuity of £100, and the sum of
"£1000, which he considered would, with property
"she was entitled to after his death, make up to her
"an income of £2500 a year. In fact, those gifts
"made up her income only to £1800 a year, and Sir
"John Leach, M. R., held that she was entitled to
"have the deficiency supplied out of the testator's
"residuary estate.

"Again in *Jordon* vs. *Fortesque*, 10 Beav., 259, a
"testator by a codicil gave to a legatee £500 in ad-
"dition 'to £1500, which I have before bequeathed
"to him.' The testator had, in fact, bequeathed to
"him £1000 only. And it was held that the legatee
"was entitled to £2000 by implication."

Observe the grammatical construction of the sentence. The verb used is in the singular "**is** *bequeathed*." Its subject is the pronoun "*which*." This

pronoun is here used, therefore, in the singular number, and represents "*the property*," which is also in the singular number. The codicil, therefore, gives "*the property*" . . . *which* in and by said original will **is** bequeathed to my executors in trust, etc." It does not "give, bequeath and devise the 500 shares "which **are** bequeathed, but *the property*" "*which* in "and by said original will **is** bequeathed." This, then, is the subject of the gift.

The words "*the property*" are the governing words in the description, and if the parenthetical words following do not technically include all that is included in the expression of what is bequeathed, viz.: "**the property** . . . **which** in and by said original will is bequeathed, etc.," then the rest of what is included in that expression passes by implication. As a test, transpose the expression, for the parenthetical phrase may be just as well read at the end of the donating words, and has precisely the same effect there as where it stands. Then it would be, "*I hereby give and bequeath to, etc., . . . the property which in and by said original will is bequeathed to my executors in trust for the use of the children of James B. Colt, to wit: five hundred shares of the stock of the Colt's Patent Fire-Arms Manufacturing Company.*" Can anything be plainer than that the last phrase would be simply a mistaken description, and therefore necessarily to be rejected? Unless, indeed, the peculiar meaning exhibited by the testator in his will is to be recognized; in which case the gift over of the primary legacy of 500 shares carries its corresponding residuary stock.

The evident intention and design to leave "*the property*"—*the same legacy*—*in the hands of the same trustees* for the purpose named is not to be mistaken, and in any view, the use of these words should

be held to express an intention that the legacy should carry with it all that accompanied the primary legacy in the original will.

In any other sense the expressions "*the property . . . which in and by said original will is bequeathed*," etc., and "*to wit, five hundred shares of the stock*," etc., would be repugnant to and contradictory of each other: and in that case the words which conform to the intention of the testator to be gathered from the general tenor of the instrument should prevail. "*Ex antecedentibus et consequentibus fit optima interpretatio*" (*Broom's Legal Max.*, *514-21). The two expressions are so interwoven with each other that no application of the rule in regard to priority in their employment seems possible.

But to follow the testator's intention in the matter is the "paramount rule," as stated by Coleridge, J., in *Morrell* vs. *Sutton*, 1 Phillips Ch. Rep., 536, 537. "I think it may be taken as clearly established that this rule must not be acted on so as to clash with another paramount rule, which is that before all things we must look for the intention of the testator as we find it expressed or clearly implied in the general terms of the will: and when we have found that on evidence, satisfactory in kind and degree, to that, we must sacrifice the inconsistent clause or words, whether standing first, last, or indifferently."

See also Jarman on Wills, Vol. I., [420].

It is observable also that the clause immediately follows this bequest, in which the testator speaks of his original will as having been altered, changed, and modified, and in which he says: "I hereby confirm "and establish said original will as altered, changed, "and modified by this and the previous codicil, as and "for my last will and testament."

This thought is immediately connected in his mind with that expressed in the preceding paragraph. He *has changed* his original will : and how ? By substituting the children of Christopher Colt in the place of the children of James B. It is to exist henceforth as ALTERED and CHANGED. The "original will" is then to stand as *altered* and *changed*, so as that it shall in terms give to the trustees of Christopher's children the legacy just as if it had been so written in the will itself. And thus it carries with it *per se* the residuary stock appertaining to it in the same manner as it would have gone to the benefit of the children of James B. if the will had not been "changed and altered."

2. But the bequest in the will was one made to the executors as trustees. They took the property, and their taking was not interrupted by the codicil, which only substituted other cestuis que trust.

We have already referred to the fact that our trustees were not made parties as such in that action, by which means the question of *their title* was not put in issue so as to be definitely passed upon and finally decided.

Whatever may have been the motive for this conduct of the Connecticut case, it led to the point being overlooked that the gift of the stock for our benefit ***is made*** to "persons and parties" ***thereinbefore named*** in the original will.

The stock in the original will is given to TRUSTEES and the gift to them was never revoked. They *remain* the legatees under the codicil, as well as under the original will. The only difference is that the purpose to which they are to apply it is changed by the codicil. This is all which the codicil, by its terms, purports to do.

That is to say, the original will gives the stock to TRUSTEES — the primary legacy and the residuary stock unitedly — to hold for the benefit of the children of James B. Colt. And the codicil does not revoke the gift *to the trustees*, but confirms it to them. It does not go through with the process of *giving it to the trustees over again* even, but *leaves it* in their hands under the gift in the will, merely providing that it shall be held by them in the same manner, etc., as provided in the original will. The testator had in mind, at the time, the fact that by the will it was given to the *trustees*. He speaks of it as "*the property which in and by said original will* **is bequeathed** *to my executors in trust.*" He recognizes the fact that it is *bequeathed* to the trustees and leaves it so.

It remains given to these trustees as before; but they are directed to hold it for the children of Christopher, instead of the children of James B.

The whole *title* to the stock was in the trustees for the purpose of the trust — the *cestuis* under the will, as well as those under the codicil, having no legal title, but only remedies in equity. *Lewin on Trusts*, 247.

The trustees take under the will, and hold under the codicil upon the same trust — the beneficiaries only being changed. And the beneficiaries are thus changed not by *revocation* but by way of *substitution*.

The case of *Lord Carrington* vs. *Payne*, 5 Vesey, 404, is directly in point. In this case the testator devised his real estate to trustees and their heirs in trust for a term of years for specified purposes; and subject thereto, to E. Pearce for life, with the remainder to his first and other sons in tail: remainder

to William Pearce for life, etc.; remainder to George Pearce for life, in like manner; and reversion in fee to his younger brother, etc.

After giving certain bequests of personal property, then followed a disposition of the "*residue* of his personal estate" to the same trustees to be laid out in land, and a direction that it should be settled to such uses as he had "*hereinbefore*" directed concerning his land, and in the meantime to be invested in government securities to be held in like manner, and upon the same trusts.

There was a first codicil substituting new trustees with the same powers, and disposing in the same general manner as before of subsequently acquired real estate.

By a third codicil, after reciting the general provisions of the will, he "revoked" so much of his will as directed the settlement to William Pearce for life, and remainder in tail to his sons, etc; and directed that in case of the failure of Edward Pearce (the person first named), the property, instead of going to William Pearce, etc., should go to *George* Pearce for life, and his sons in tail, and then to John Pearce for life, remainder in tail, etc., and then to *William* Pearce for life, and remainder, etc.

The effect of this was that the beneficial estate given by the original will to William Pearce was by the codicil given to George Pearce, and William was given a contingent interest postponed after all the others.

Edward Pearce died without issue in the testator's life. By the original will, the beneficial estate would

have gone to William Pearce as tenant for life in possession, with remainder in tail to his issue. By the codicil, it went to George Pearce, in that way.

The latter, accordingly, brought his bill to have the will established. The main question was to whom did the "residue of the testator's personal estate" belong. Of that nothing was said in the third codicil, and it became necessary to settle the question on general principles of law.

The very close resemblance between this case and that of the provision for the children of Christopher Colt is observable. In the case cited, there is a devise to executors in trust of real estate (p. 421)— in our case, there is a bequest to executors in trust. In Lord Carrington's case, the residue of the personal estate is bequeathed to the same uses as are "*hereinbefore*" directed concerning the land. In the Colt will, the residue of the stock is given to the "persons and parties" to whom legacies of stock are "hereinbefore" given.

In the Lord Carrington case, the gift, so far as it is for the benefit of William Pearce, one of the *cestuis*, is "revoked" by the codicil; in the codicil of Col. Colt's will, the gift, so far as it is for the use and benefit of the children of James B., is "revoked."

In the Lord Carrington case, a codicil still leaves the devise to the executors as trustees, but changes the beneficiaries; in the Colt will, likewise, the bequest to the executors is continued though the beneficiaries are changed. In that case, as in Col. Colt's will, there is a *union* between the principal and primary bequests and the subordinate or accompanying legacy which remains uneffaced. In both cases the same question arises: the codicil is *silent* as to the

disposition of the residuum of the personal property, and the inquiry is to whom does it belong?

Does it remain in the hands of the trustees and follow the change in the beneficiaries? The question was thoroughly argued by the Attorney-General, Solicitor-General, Mr. Romilly, and others. It was claimed strongly by the counsel for *William* Payne (Pearce) that the third codicil was a *revocation* of the devise. They argued accordingly that, as there was no revocation of the residuary cause as to the personality, it followed the provisions of the *will*. While the Master of the Rolls admitted, for the sake of argument, that such a result might follow upon a *revocation*, he expressly held that this was not a case of that kind.

He says (p. 421): "This codicil does not revoke "the devise of the real estate. It leaves the devise "of the real estate to the trustees in full force. It "does not in any degree *disunite* the estates to be "purchased (from the residue of the personal es- "tate) from the settlement to be made of the real es- "tate. It is, therefore, fallacious to argue that it was "a revocation of the devise of the real estate at all. "*It remains devised to the trustees*, and the only al- "teration is in the mode of succession to be directed "in the settlement to be made. The will directed a "settlement to certain uses, and gave the personal "estate to be laid out in land, to be settled to the same "uses." . . . (p. 422): "The will is not re- "voked as to the *union* of the two species of estates. "The codicil makes no alteration with regard to *that* "*union*, and though the testator makes use of the "word 'revoke,' the codicil is not a revocation *as to* "*that union*, but merely an alteration of the order of the "limitations to be inserted in the settlement, and it is "no more than if the devisor with his own hand had in-

"serted the name of George and John before William, "and then republished the will. The codicil leaves "the will in full force with regard to everything, not "expressly or by necessary inference revoked or al- "tered, and I am clearly of opinion that the settle- "ment, so far as respects the union of the estates, "remains in full force.

Then, after some special arguments applicable to the case in particular, he proceeds: "But the ground "on which I rest, is that the will is not revoked by "the codicil, which makes no alteration but in the "order of limitation in the settlement to be made, and "does not alter the devise."

A great point in the Lord Carrington case and kindred decisions accordingly is this: There was in the original will a fixed connection between the principal legacy and the subordinate one of the residue. The two were united as a principal thing and an accessory. This connection must continue until IT is revoked. There was nothing in the codicil to sever the connection — to break the chain which bound the two classes of legacies together. Accordingly, it must remain. A substitution of a new *cestui que trust* by the codicil for the one named in the will in the principal legacy, had no effect in the way of severance of the *connection* between it and the subordinate legacy.

These remarks seem wholly applicable to the provisions in the Colt will. The bequest to the executors as trustees is unrevoked, but the names of beneficiaries are changed. It is the same, in the language of the Court just cited, as though the names of the children of Christopher Colt had been substituted and the will had been republished.

The will and codicil make one instrument (see cases already cited)— THE UNION BETWEEN THE BE-

QUEST AND THE RESIDUARY CLAUSE IS NOT REVOKED —and the result is that the children of Christopher Colt are entitled to these united bequests.

Of course, if the original bequest is not revoked, but only given over to the benefit of other *cestuis*, it carries with it the residuary stock by the express terms of the will.

See also Alsop's Appeal, 9 Penn. St., Rep. 374.

In this case the will of the testator, after making various bequests, then provides that if his property should exceed $168,000, the surplus should be divided *pro rata* "among the different legatees." The testator made several codicils and gave additional legacies to other legatees. He also in a codicil recites the death of one of the legatees named R. A. Eyre, and bequeaths that legacy to "the youngest daughter of my (his) friend and neighbor, J. Sergeant."

A codicil also "*rescinds*" a legacy given in the will to G. P. Shipman, and directs that legacy to be added to a bequest made to Gustavus Cleeman.

While holding that new legatees to whom legacies are given by codicil would not be entitled to a proportional share of the surplus under the clause of the will which directs it to be divided among the different legatees, the Court still hold that this does not apply to Miss Sergeant and Gustavus Cleeman with respect to the legacies in which they are substituted by the codicils for other legatees named in the original will.

The Court say (p. 387): "We cannot concur with "the decree below letting in on the surplus funds all "the codicil legatees."

"Our objection, however, is inapplicable to Miss

"Sergeant and Mr. Cleeman, so far as they are sub-
"stituted for two of the original legatees. This sub-
"stitution operates to subrogate them to all the rights
"of the parties first named."

The reason for the decision in the foregoing, and in some other cases, to the effect that *entirely new and additional legatees* named in the codicil (who are not made donees of legacies definitely created by the will, and the direction of which is changed by the codicil in their favor), cannot come in to share the surplus given proportionally to the legatees of primary legacies in the will, is because the UNION between the legacy in the will and the gift of the residue is so strong and complete that no new legatee, except on strong proof of intention, can come in to participate in the residue. But, as we have seen, this is held not to apply at all to a substituted legatee, the union in this case being still a subsisting one.

In the Colt case, no new legatees are made by codicil. All those who take under the codicils, take as being substituted for legatees or for beneficiaries named in the will, in the sense of the above decision —unless we except the case of J. Deane Alden, who was a legatee in the original will, and whose legacy is augmented by codicil.

It is at all times an important consideration that the testator manifests a design that the two bequests should go together, and that he unites both the primary legacy and the gift of the residuary stock in the hands of trustees—and the same trustees—for this purpose by the will.

We think we are safe in saying that there are no reported cases which, upon examination of the nature and language of the will and the grounds upon which

the decisions stand, will be found to contradict the position above taken.

Cases where a will gives a certain bequest or devise to parties described as the person or persons taking under some other provision, and where it has been held that the *revocation* of that provision does not necessarily revoke the bequest, are not really in conflict with the point here taken. In such cases, it will be found that there was either *a revocation* as distinguished from a *substitution*, or that there was no connection or UNION between the provisions, so that they were wholly independent. In none of them was there any clause resembling that in Mr. Colt's codicil, "confirming and establishing the original will as ALTERED, CHANGED AND MODIFIED."

Thus *Darley* vs. *Langworthy*, Ambler, 653 (reversed by the House of Lords), was a case of *revocation*. So was *Lord Sydney Beauclerk* vs. *Mead*, 2 Atkyns, 167. Both of these cases, it will be observed, are reviewed and explained in *Lord Carrington* vs. *Payne*. There was no substitution in either of those cases. There was no gift to trustees, such trustees being the same persons in both provisions of the will, and the same persons in both will and codicil, with substituted *cestuis que trust*. And so it may be remarked of other cases of the same class.

In *Roach* vs. *Haynes*, 6 Vesey, 153, there was a separation made in the property bequeathed — one part of which was given to trustees, and the other *directly* to the *legatee*. And the Master of the Rolls expressly rests his decision upon the ground of this separation. According to the reasoning adopted by him, it is plain that if the two bequests had not thus been separated by the adoption of a different manner of donation for each (as, for instance, if they had

both been given to trustees, instead of being separated in the original will and one being to trustees and the other being given directly), a substitution for the one would have carried the other.

The review of the Lord Carrington case may be properly closed by calling attention anew to the difference between substituted legatees and substituted *cestuis;* and the observation that while we urge that a substituted legacy may properly carry with it the subordinate gift of the residue, the case of a *substituted cestui* carries such residue not only for the same reasons, but on a distinct and independent ground as well, viz.: that there is *no revocation* in any sense of the bequest. The executor must still pay its amount to the very person originally named by the testator, that is to say to the trustee, who is the legatee through all.

3. But the codicil, in our case, does not by its terms purport to revoke the legacy in the will, except so far as it was for the benefit of the children of James B. Colt, or any of them.

The legacy was given to the trustees — the use and benefit thereof only was given to the children. The codicil revokes "any and all other legacies . . . heretofore at any time made to or *for the use and benefit of said children or any of them.*" This legacy was not one *made to* the children but to the trustees. So far as the clause affects it, therefore, it only in terms revokes the "use and benefit" given to the children. By the very next clause, the gift to the trustees is confirmed and they are directed to hold it for our benefit. And the gift of the beneficial interest to the children of Christopher instead of James B. works no further revocation.

THE ORIGINAL BEQUEST IS NOT TO BE DISTURBED ANY FURTHER OR TO ANY GREATER EXTENT THAN IS NECESSARY TO RENDER THE CODICIL EFFECTUAL.

"In dealing with such cases, it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

Jarman on Wills, Vol. I., p. 162 (3d Ed.).

"One devise is not to be held revoked further than is absolutely necessary by a subsequent inconsistent devise."

Redfield on Wills, 352.

This is the rule of law which the counsel for James B. Colt in *Colt* vs. *Colt* say, is well settled and of long standing, and "is to be applied in its *exact literal meaning*," and that "Courts invariably endeavor to confine the revoking powers of a codicil within the narrowest possible limits"; and the Court in that case sanctions this position.

See also *Kane* vs. *Astor's Exrs.*, 5 Sand., Sup. Court, 467. Also *Hearle* vs. *Hicks*, 8 Bingham, 475, in which Tindal, C. J., says, (p. 484): "Whether this devise was revoked must be determined not by any express words to that effect, but by the consideration whether upon the construction of the codicil the devise and disposition therein contained must *of necessity* be held inconsistent with the devise to the wife."

See also Carrington *vs.* Payne (above cited).

And this rule is especially to be observed when by the codicil the will is in terms ratified and confirmed in other respects.

Quincy *vs.* Rogers, 9 Cush. 291.

The change made by the codicil, by which new *ces-*

tuis are substituted in place of those mentioned in the will, is not in the least inconsistent with, but is confirmatory of the bequest to the trustees, and the reverse of a revocation.

Suppose the testator had said in the codicil: "I hereby cancel and wholly revoke any and all legacies by me heretofore at any time made, *so far as the same are* to or for the use and benefit of said children (of James B.), or any of them," and then had proceeded to give the beneficial interest in the property to the children of Christopher, the property to be held by the trustees for the benefit of the latter, in the same manner and subject to the same limitations as provided in said original will in the bequest to the children of James B. Colt. We suppose it would be conceded that this would effect only a revocation of the original bequest so far as it conferred a beneficial interest upon the first named *cestuis*, and would transfer that beneficial interest to the *cestuis* named in the codicil. It would not be a revocation of the gift, but only of the direction which was to be given under the trustees to the beneficial interest. It will be observed that the insertion of the words, "to wit, 500 shares, etc.," as in any way tending to limit the gift, are not material in this connection. The trustees were "persons and parties" to whom a primary legacy of stock was given by the original will. And if the original gift was not actually revoked, it carries with it in their hands all that it ever carried.

And yet what does this codicil do more or different from what its effect would have been if it had been written in the words we have above used? Does it make any difference whether the testator says "I revoke all legacies by me heretofore made to or for the use and benefit of said children (of James B.)," and then proceeds to give over to other legatees the ben-

eficial interest of the same primary legacy to be held in the same way; or whether he says "I revoke any and all legacies so far as they are to or for the use and benefit of said children (of James B.)," and then gives over the beneficial interest in the primary legacy to the other legatees, directing the trustees to hold it in all other respects in the same manner as before. Does he do any more than to revoke the bequests so far as they are for the use and benefit of the children of James B.?

If the testator had revoked all the legacies in his will to or for the use and benefit of the children of James B., and had stopped there, that would have been one thing. But that is only a part of the provision in the codicil which we are considering. Under that, standing alone, it might be said that it would work a revocation, because the trust would fail for want of beneficiaries. But when the testator proceeds, as he does here in the same breath, to vest precisely the same beneficial interest in the primary legacy in other *cestuis*, directing it to be held in all other respects in the same manner as before, it is quite another thing. We submit that the bequest of the primary legacy is not revoked — there is no want of *cestuis* for a single moment — the title to the property is given to the trustees, and remains in them for the benefit of the *cestuis* substituted by the codicil.

The will and codicils are to be taken together as one instrument.

"There is no deviation from the rule that all the papers which constitute the testamentary act are to be taken together, embracing the will and the codicils

and all papers referred to so as to be incorporated with the same."

Redfield on Wills, Vol. I., *435, and cases there cited.
Crosbie *vs.* MacDoual, 4 Vesey, 610–616.
Pigott *vs.* Wilder, 26 Beavan, 92, and cases cited.
Earl Temple *vs.* Duchess of Chandos, 3 Vesey, 685.

The republication and confirmation of the will as altered, changed and modified by the codicil is the same as if the testator had made a new will of the date of that republication.

Redfield on Wills, *370–1.
Williams *vs.* Goodlittle, 10 B & C. 895.
Hannis *vs.* Packer, Ambler, 556.
Gordon *vs.* Ld. Reay, 5 Sim. 274, 280.
Masters *vs.* Masters, 1 P. Wms. 424.
Washburn *vs.* Sewall, 4 Met. 63, 66–67.
Coale *vs.* Smith, 4 Pa. St. 376, 386.
Rowley *vs.* Eyton, 2 Mer. 128.
Haven *vs.* Foster, 14 Pick. 544.
Harris *vs.* Davis, 1 Collyer, 416, 427.

See also 1 Wms. on Executors [216], top p. 255 (6 Am. Ed.).

"It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*. It brings down the will to the date of the republishing, and makes it *speak* as it were *at that time*."

The gifts of stock take effect from the death of the testator, and as to them the will and codicils speak as

of and from that time, and are ambulatory during the testator's life. The will and codicils should be read with reference to this.

It is impossible to read through the papers constituting the testamentary instrument without realizing what the testator intended to accomplish by the arrangement adopted. This consideration by itself is a controlling one. If, in the attempt to apply any technical rule of construction, another result would be produced, and this intention defeated, it would be the rule which must bend or give way, and not the intention.

But an analytical examination of the will and codicils, by the aid of the various rules and means of interpretation which the language used and the mode of proceeding adopted render applicable, establishes the legal effect of the testamentary instrument to be in conformity with the apparent design of the testator instead of tending to defeat it.

With all these powerful considerations combining together in the support of that construction which will secure to us the benefit of the legacy as created by the testator in the will, and originally intended for those whose places we take under the codicil, we cannot but feel confident that the examination of the subject by the Court will result in placing the validity of our claim beyond question.

THE CONNECTICUT JUDGMENT IN THE CASE OF COLT vs. COLT NOT A BAR OR AN ESTOPPEL IN THE PRESENT ACTION.

The suit in Connecticut was not an action between the same parties as those in the case at bar. That was a suit in equity, brought by James B. Colt against Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, as *executors* of the will of Samuel Colt; and certain other parties were joined as defendants, as being legatees under the will.

The case at bar, on the other hand, is an action brought by the plaintiffs against Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, as *trustees* of the property given to them in trust, and asking for an account.

The other legatees and the executors are also made defendants on account of their interest in the subject matter, and their secondary liability as heretofore explained.

The Trustees were not parties, as such, in the Connecticut case.

The defendants, Colt, Hubbard, and Jarvis, were:

1st. Executors under the will.

2d. They had a personal interest under the

will as legatees. The will gave them a legacy of fifty shares of stock each; and also as compensation for their services as executors, one-fourth of one per cent. of the cash value of the estate.

3d. — They were *trustees* of the stock given for the benefit of the children of Christopher Colt. It was an *active* trust, under which the title and possession of the trust property was to be retained by them for a certain period, and consequently the trustees alone, in their capacity as such, possessed the right to have and receive the trust property from the estate, and to control it and their claim to it, free from the interference of the *cestuis* or anybody else.

They were made parties to the case referred to only in their capacity as executors, and in the second right above named, as claiming an individual interest under the will.

(Record, p. 64.)

Mrs. E. H. Colt was also made party as guardian of her son and administratrix of her daughter.

They were not made parties as trustees, nor brought into the suit in their representative capacity in our behalf.

THE ANSWER SPECIFICALLY STATES THAT THEY DID NOT APPEAR OR ACT AS OUR TRUSTEES IN THAT SUIT.

(Record, p. 80.)

As such, they were not parties to the record. No judgment was taken againt them, as parties who had answered, or as parties who had failed to answer. No

Their relations, powers, and duties in their respective capacities are as separate and distinct as if different individuals had been named for the different offices.

In *Plimpton* vs. *Richards*, 59 Maine, 115, 117, 118, APPLETON, C. J., says:—

"The duties and responsibilities of trustees and of executors are distinct and different. They act in different capacities and under different liabilities. They are legally as distinct as if they were different individuals."

In *Wheatly* vs. *Badger*, 7 Penn. St., 462, where the executor was also appointed trustee, the Court held as follows: "It would be as absurd for a trustee to attempt the duties of an executor as for an executor to attempt the duties of a trustee, and it is therefore the business of the Court to separate the two offices in a question like the present, *redendo singula singulis*. As executor, he has to pay the legacies; as trustee, he was the devisee and depository of the legal title for the accomplishment of confidential purposes, with which the office of executor has no necessary connection."

"If a testator in his will appoint his executor to be a trustee, it is as if different persons had been appointed to each office."

Perry on Trusts, Vol. I. §281, (2d Ed.).

In *Parsons* vs. *Lyman*, 5 Blatchf. 170, 173, this language is used by the Court: "The relation of the defendants to the trust estate, as trustees, is the same as if they had not been named as executors in the will, and the property bequeathed to them in trust by their individual names." . . . "Although the

defendants are appointed by the will to act in both capacities, this fact does not obliterate the distinction which the law makes between the duties and powers that pertain to the respective offices."

In *Judson* vs. *Gibbons*, 5 Wend. 228, where property was devised to the executors upon trust for certain purposes, the Court held that "the estate thus devised at the testator's death belonged to the executors named, as trustees, and not as executors. The executors, indeed, were entitled to it in preference, as far as it was necessary for the payment of debts, but the offices of executors and trustees are not necessarily blended."

In *Sims* vs. *Lively*, 14 B. Mon. 433, 447, where the devise was to H. and F., imposing upon them certain duties and trusts, and in a subsequent clause they were appointed executors of the will, the Court held that: "Although the devisees were also named as executors, and qualified as such, yet, as their rights and duties in these two capacities are as different as if the persons to whom they pertain were different, so ought their liabilities to be."

Williams *vs.* Cushing, 34 Maine, 370, 375.
Perkins *vs.* Lewis, 41 Ala. 649.
Hayes *vs.* Hayes, 48 N. H. 219.

When different rights meet in the same person, they are to be treated as if they were different persons.

Ross *vs.* Barclay, 18 Penn. St. 179, 184.
See also, Conklin *vs.* Egerton's Adm., 21 Wend. 430.
Dominick *vs.* Michael, 4 Sanf. (Sup. Ct.), 374, 399.
Dunning *vs.* Ocean Bank, 61 N. Y. 497.
Williams on Ex., Vol. I. [242], 6th Am. Ed., p. 283, note s.

When the same persons are appointed trustees and executors of a will, a revocation or declination of their appointment as executors is not necessarily a revocation or declination of their appointment as trustees. This shows how distinct the two capacities are.

Williams on Exrs., Vol. III. [1796], 6th Am. Ed., 1894, note h.
Graham *vs.* Graham, 16 Beav. 550.
Cartwright *vs.* Shepheard, 17 Beav. 301.
Williams *vs.* Cushing (above cited).

In *Dunning* vs. *Ocean Bank*, 61 N. Y. 497, 502, the Court say: "This trust duty was not annexed to the office of executor, but was devised to him as a *person*. He might, therefore, accept and execute the trust without proving the will, or taking out letters testamentary. He became trustee and was vested with the trust estate by virtue of the will alone."

Also Sheet's Estate, 52 Penn. St. 257.
Garner *vs.* Dowling, 11 Heisk (Tenn.), 48, 50.

The fact that they charged the *cestuis* $5,500 as compensation *as trustees*, besides and distinct from their compensation as executors (which was fixed by the will), shows how *they* regarded the two capacities in the respect referred to.

They did not appear in that suit in the SAME RIGHT in which they are sued here. Consequently no bar.

Their sphere of operations in the case was bounded and limited to that of the character in which they were brought into it.

Not being there as *trustees*, they consequently could neither act nor speak as such.

Suppose the respective positions of *executors* and trustees had not been united in the same persons, but had been occupied by different persons. It is plain that the trustees, not being made parties as such to the suit, could bring an action for the trust fund after the judgment, in the same manner as if it had never been rendered.

The case is not altered by the appointment of the same persons to exercise both functions.

The *right* to the trust fund inheres in our *trustees*, notwithstanding the judgment, with the same effect as if they and the executors had been separate and distinct individuals.

Even if the trustees had been minded to appear and make the subject of their rights in that representative capacity an element in the case, they could not have done so without first being made parties as such. They could not intrude themselves into a suit as trustees, being uninvited. A party, in order to create an estoppel, must be *rectus in curia*.

Estoppels are technical, and must have, as a vital prerequisite, all necessary legal formulas.

But they were not minded to appear or act in the suit in their capacity as *trustees*. They say in their answer (in which all the defendants concur), that "*they were cited to appear therein as executors of said will, and did appear therein*," and further, that "*these respondents as such executors did not appear or act particularly as trustees for or in behalf of said petitioners*."

There can be, therefore, no pretence that their par-

ticipation in the case as *executors* involved in any way an appearance as *trustees*, since they deny that as *executors* they occupied or acted in that capacity in the case.

They say they did not appear or act as trustees. Suppose they had incorporated a statement to that effect in their answer in that case, and thus specifically defined the character in which they were brought into it, and the sphere in which they appeared and acted; and had protested against being bound further than that, until they should be made parties as trustees. Might they not have done this, as the pleadings stood in that case? And if they had done so, could any possible pretence then be made that the proceedings of the case would bind them in their capacity as trustees?

But, if they could do so, it was because it would have been a correct statement of the effect of the pleadings and of the scope of their appearance in the case, as it stood. Their statement here of the manner of their appearance must have the same effect, for the purposes of this case, as if it appeared on the record of that case.

They were not parties in the same right as that which they represent as defendants in this case, and the judgment cannot affect them or us in the matter of that right.

"Every person may at different times, or at the same time, occupy different relations, act in different capacities, and represent separate and perhaps antagonistic interests. *It is a rule of both the civil and the common law that a party, acting in one right, can neither be benefited nor injured by a judgment for or against him, when acting in some other right.*"

Freeman on Judgments, Sec. 156, and cases cited.

"A judgment or decree concludes parties only in the character in which they sue or are sued."

Bigelow on Estoppel, 65 (2d Ed.).

In *Robinson's Case* (Coke's R., Part V., 33 b), a former suit by the same plaintiff as administrator was held to be no bar to his suit as executor.

See also Plant *vs.* McEwen, 4 Conn. 544.
Hollister *vs.* Lefebre, 35 Conn. 456.

"It is not sufficient to satisfy the requirements of the rule of *res adjudicata* that the same *persons* are litigants in the two actions. For the same person may in law be considered as another person, and consequently another party, by suing in a different capacity."

Wells on Res Adjudicata, and Stare Decisis, Sec. 21.

QUAIN, J. "It is generally put in the books that the plaintiff must be, not only the same person, but he must be suing in the same right. I think that in these two actions brought before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether, and therefore that the estoppel does not arise."

Legett *vs.* R. R., Law R., Q. B. Div., Vol. I., 599.
See also Stoops *vs.* Wood, 45 Cal. 439.

It is perhaps hardly necessary to add that the fact of their being made parties in their individual rights

as claiming the legacies given to them personally by the will, could give the judgment no effect upon our rights or upon theirs in their representative capacity as our trustees. They must have been made parties in that representative capacity as distinct from their individual rights, in order to bind them in the former.

In the case of *Rathbone* vs. *Hooney*, 58 N. Y. 463, recently decided in the Court of Appeals, where the beneficiary and the trustee in his individual capacity, but not as trustee, were made parties to a former judgment, the Court say: "It is also a conclusive answer to the claim that the judgment in the foreclosure suit is an estoppel, that a judgment against a party, sued as an individual, is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is, in contemplation of law, a distinct person and a stranger to the prior proceedings and judgment."

The Court, in *Lewis* vs. *Smith*, 11 Barb. 156, held that a judgment against a widow in her character of devisee and executrix, did not bar her claim for dower, because, among other things, she was not made a party as doweress, but as devisee, and in the character of executrix alone.

See also Hollister vs. Lefebre, 35 Conn. 456.

But the defendants, having declared that they did not appear or act as our trustees in that case, could not set up here that they were parties to it. That would be to assert a fraud on their part, which would not be admissible. Equity would not permit such a defence to be set up by trustees as an answer to the claim of their *cestuis*. Even if it were true, it would not be a defence of which they would be entitled to avail themselves in equity, as they would not be com-

ing before the Court with clean hands in the discharge of their trust. Their statement, therefore, that they did not appear or act as our trustees in the case, concludes the matter, so far as they are concerned as trustees.

And this conclusion coincides with the interest, and probably therefore, with the preference of the defendants, who are here sued as trustees. Of course the determination most prejudicial to them would be to find that they were parties as trustees to the case in question. For, in that event, they broke their trust, by not appearing as such in our behalf, and by denying their own title and the title of their *cestuis*, and would be answerable for the damages thus occasioned. To hold that they were not there as trustees, preserves their rights and claims as such.

The defendants, therefore, do not take the untenable ground that they were present in that case as trustees, but assert the contrary. We have, however, thought it best to examine the matter, as being necessary to a thorough discussion of the subject and a presentation of the mode in which such a case must have been commenced and carried on, if our rights and those of our trustees were to be included within its scope and effect.

The defendants must therefore seek to place the judgment on some other ground, in attempting to maintain it as a bar in this suit.

Should they undertake to contend that they were not trustees at the time, any such assertion as that is sufficiently answered by what we have said upon the subject of their becoming trustees on the probate of the will, and having furthermore become trustees in actual possession.

At the same time, in no possible view, could such a consideration have any effect in favor of the judgment as a bar, since the *trust* was created by the will, and was in full existence from the time of the probate; and could at no time, and for no pupose, fail for want of a trustee. As an existing trust, it must have been properly brought into and represented in the suit, even if, on account of any vacancy, it had been necessary to appoint a trustee. Any such assertion as that referred to would therefore be unavailing, even if it were not entirely without foundation in fact and in law.

Trustees of express Trusts are real parties in interest in any suit relating to the title to the trust property, and must be present as such in the case, in order to create a binding judgment.

It hardly seems necessary to cite authorities in support of this; but the rule may be found enunciated in the case of the *Western R. R. Co.* vs. *Nolan, et al.*, 48 N. Y. 517.

In this case the Court say:

"The plaintiff should be regarded as *cestui que trust*, and interested in the said fund. *The trustees* are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attack or injury, tending to impair its safety or amount. *The title to the fund being in them, neither the cestuis que trust nor the beneficiaries can maintain an action in relation to it as against third parties, except the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the Court as parties defendant.*"

See also Trustees of M. E. Church *vs.* Stewart, 27 Barbour, 555.

And the same rule which prevents the *cestuis* from litigating the question of the title to the trust property as parties plaintiff, would of course prevent their doing so as parties defendant, in the absence of the trustees.

And it is manifest that this must be the rule; since, if it were otherwise, the *cestui que trust* as a party plaintiff or defendant, in the absence of his trustee, might litigate the title of the trust property, and deprive the trustee of it, without his being heard, and even without his knowledge. The design of the creator of the trust is to place the property, its management and the title to it, entirely in the hands of the trustees for a certain period, and to make them responsible therefor.

The interest of the *cestuis*, during the continuance of this active trust, consisted merely of a right to have a certain portion of the income expended for their personal education. They could not, by anything they might do, divert even this from the object expressly pointed out; much less, could they affect the title of themselves or their trustees to the trust property itself.

In what way could these *cestuis*, and especially those who were then in their minority, by any proceeding on their part, alter and derange this title from the mode in which it had been fixed by the testator? How could the *cestui*, Samuel P. Colt, for example, then thirteen years of age, by being a party to a legal proceeding, or through any means whatever, become endowed with the power of exercising a controlling and decisive influence upon the matter of the title to the trust property, or any part of it, by whatever con-

duct or position he might adopt or assume? The very *object of the trust* was to prevent the *cestuis* from having the possession of the property, its management, or any control over the title to it, during the period named. It is inadmissible, therefore, to suppose that they could, as plaintiffs or defendants, enable a judgment to be established, in relation to the title to the property, in a suit in which its holders, the trustees, were not made parties as such.

A judgment in a case affecting the title to trust property in which the trustees are not made parties, is not final in the matter.

Goddard *vs.* Prentice, 17 Conn. 546–55.

"Upon the general principles of courts of equity, there would be an impropriety in binding either the legal claimants or the equitable claimants, unless they were fully represented and permitted to assert their rights before the Court; and if not bound, the decree would not be final in the manner litigated."

Story Eq. Pleading, Sec. 208.

"As a general rule the trustees and their *cestuis que trust* are regarded as being so independent, that proceedings against one have no effect against the other, and both are essential to a complete determination of any action in reference to the trust estate."

Freeman on Judgments, Sec. 173.
Johnson *vs.* Rankin, 2 Bibb. 184.
Paton *vs.* Murray, 6 Paige, Ch., 474.

"The objection is not one of form merely, but of substance, and no decree can be made without his presence."

Phipps *vs.* Tarpley, 24 Miss. 597, 599.
Platt *vs.* Oliver, 2 McLean, 267, 307.

McRea *vs.* Branch Bank of Alabama, 19 How. 376, 377.
Caldwell *vs.* Taggart, 4 Peters, 190, 202.
Rooke *vs.* Kensington, 39 Eng. L. & E., 76, 77.
In re Chertsey Market, 6 Price, 261, 278.
Barbour on Parties, 529–535.
Jones *vs.* Jones, 3 Atk. 110.
Daniels, Ch., p. 246, 247, and note (4th Am. Ed.).

"In suits by or against strangers, it is a general rule, where no enactment or order of the Court makes an exception, that all the trustees and all the *cestuis que trust*, as together constituting but one interest, must be made parties."

Lewin on Trusts, 6th Ed., p. 796–7, and cases cited.

"Trustees and *cestuis que trust* are the owners of the whole interest in the trust estate, and therefore in suits in equity in relation to the estate by or against strangers, both the trustees and *cestuis que trust* must be parties representing that interest."

Perry on Trusts, Sec. 873.
See also Story's Equity Pleadings, Sec. 206–211.
Wood *vs.* Williams, 4 Mad. 186.
Cope *vs.* Parry, 2 Jacob & Walker, 538.

In *Cassidy* vs. *McDaniel*, 8 B. Mun. 519, in holding that a trustee is a necessary party to a suit in regard to the trust property, the Court say: "John Hanna, the trustee of Mrs. McDaniel and her children was an indispensable party in this case. No appropriate relief could be granted without having him before the Court."

See also Upham *vs.* Brooks, 2 Story, 623.

The questions raised in the Two Suits are not identical.

In this respect the Connecticut judgment is lacking in another requisite which is indispensably necessary in order to constitute it a bar or estoppel in the present action.

As might be expected, and indeed as necessarily following, from the fact that our trustees were not before the Court in their capacity as such, the question was not passed upon by it, whether *our trustees* took this stock by the terms of the will.

The question raised by the issue and passed upon by the Court (Record, p. 68), viz.: "Whether *the children* of *Christopher Colt* take any share in the residuum of stock in respect to their legacy of 500 shares, given to them in the codicil to said will," is not identical with the question now raised, viz.: Whether the *trustees* did not, by the terms of the will and codicil, take that stock upon an active trust for the benefit of said children. This distortion of the question essentially changes it, and leaves out of view an important element of the discussion.

As the trustees are named in the original will, any refinement of reasoning upon the meaning of the words "*hereinbefore named*," could not be applied to them.

This is not a mere technical or formal objection on our part to the ground taken by these defendants. It is a matter which directly affects our interests; and the course adopted by these defendants, in pursuance of the views which we controvert, has been the source of the difficulty out of which this case has grown.

No guardians *ad litem* were appointed to defend the interests of these plaintiffs in the Connecticut case, who could be held responsible therefor; and the trustees were not made parties, and did not appear or act for them, but as executors, acted against them. It is easy to see what effect it must have had upon the Court, when these individuals, who would naturally be expected to assert and champion our and their own title as trustees, gave it up, denied it, and argued against it.

At all events, the question passed upon in the case of *Colt* vs. *Colt* was not the same as that presented in the case at bar; the question of our trustee's title to the stock under the provisions of the will not having been raised, and it *not having been possible* to raise it in the former action, in the absence of the trustees as parties.

But, in order to constitute an estoppel, the subject matter in the second suit must be *identical* with that before the Court in the prior suit; that is, "The questions sought to be determined in the second action must be the *same* questions judicially settled in the first."

Freeman on Judgments, §§ 253, 460.

We are here invoking the aid of another elementary rule, which will of course be recognized without the citation of further authorities.

No estoppel upon proceedings against the other defendants.

So far as the present suit is directed against parties defendant, other than the trustees, it is sufficient to say that their liability to us is secondary, and founded upon the right of the trustees against them.

This claim of the trustees against them has nowhere been litigated, and is not touched or affected by the judgment in *Colt* vs. *Colt*, to which the trustees were not parties.

"If co-trustees commit a breach of trust, and a third party reaps the benefit, he must also as *quasi* trustee be made a defendant, since he is liable to be sued by the *cestuis que trust*. And the equities between himself and the co-trustees ought to be settled so far as practicable."

Lewin on Trusts (7th Ed.), p. 800, and cases cited.

"As between the trustees and a third person who has reaped the benefit of the breach of trust, though the trustees must make the disbursement in the first instance to the injured party, the loss will eventually be cast on the person who was the gainer by the breach of trust."

Lewin on Trusts, p. 777, and cases cited.

"If the trustees commit a breach of trust, and third persons obtain the benefit of it, they must be joined as defendants in a suit by the *cestuis que trust*. If the trustees convey the property to a third person with notice of the trust, or without consideration, such third person may be sued by the *cestuis que trust*, and *must* be joined with the trustees in a suit for relief by the *cestuis que trust*."

Perry on Trusts, § 877, Vol. II.

See also *Hanson* vs. *Worthington*, 12 Md. 419, 432, 442, in which this rule was carried into effect by the Court, the trustees being held *primarily* liable, and the other defendants, to whom, as legatees, they had wrongfully distributed the trust fund, being held *ultimately* liable.

The Trustees could not take any other position in replying to our bill than that before stated. If they had been in any sense parties and actors as trustees in Colt vs. Colt, their opposition to the trust title and to the rights of their cestuis would have been a constructive fraud, which would be sufficient to set aside the judgment or restrain their using it as a defence.

Equity would not permit them to assert or hold that they were, as trustees, parties to that case, in which they denied the trust title, or allow them to claim any protection, as trustees, under a judgment against the trust title so obtained.

Nor are we so uncharitable as to intimate or suppose that their conduct in that case was fashioned upon any other view or theory than that set out in their answer, viz.: That they were there simply as executors and not as trustees, and therefore did not assume to act in the latter capacity.

But in taking this position, they must accept along with it the necessary consequences, viz.: That the case was tried in the absence of our trustees as parties, while such parties were, as we have seen, absolutely necessary for the purposes of a judgment finally determining the title to the stock given to them in trust.

We have seen (Statement of the case ante) how much these defendants had to gain by a decision adverse in our claim, if it could be obtained. In their individual capacity as legatees, and of one of them as heir at law, and in the representative capacity of Mrs. Elizabeth H. Colt as guardian of her son, and of R. W. H. Jarvis as administrator of her daughter, they would take in great part our proportion of the residuary stock in case our claim thereto were defeated. (See tabular statement in appendix.)

We have also called attention in our statement of the case to the fact that no answer was put in, excepting the one filed by Hubbard and McFarland for all the defendants, upon the mere authority of the executors; and that, standing upon that answer, they proceeded to oppose the claims of the plaintiff, upon all the questions reserved excepting one, that one being the question relating to our right to the residuary stock; that upon this they sided with the plaintiff, with the effect referred to in our statement; and that the Court acceded to the grounds taken by the executors upon every question, and thus arrived at a decision which the defendant, Governor Hubbard, justly terms a "logical absurdity."

Any transaction by which our title to the property might be divested and vested in them, and in the course of which they omitted or failed in the slightest degree to guard and protect our rights and their own claim as trustees, would be void as operating a constructive fraud — no matter whether that transaction consists of a written transfer or a judicial proceeding.

Kerr on Fraud and Mistake, pp. 43, 44.

"Every transfer or conveyance of property, by what means soever it may be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requisitions of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery consisted of a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud."

The interest of Elizabeth H. Colt in obtaining a proportion of the residuary stock in question as guardian for her son, and the interest of R. W. H. Jarvis as administrator of his neice (Mrs. Colt's daughter), must be considered as a motive equally powerful as would be the design of a trustee to obtain a benefit for himself personally; and indeed the fact that a trustee has actually derived a personal advantage, is not even indispensably necessary to avoid the transaction.

"But we are not to understand . . . that, to entitle the *cestui que trust* to relief, it is indispensable to show that the trustee has made some advantage where there has been a purchase by himself; and that unless some advantage has been made, the sale to the trustee is good. That would not be putting the doctrine upon its true ground, which is, that the prohibition arises from the subsisting relation of trusteeship. The ingredient of advantage made by him would only go to establish that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning. But the principle applies, however innocent the purchase may be in a given case. It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain, advantageous to himself. The fact may be so and yet the party not have it in his power distinctly and clearly to show it. There may be fraud; and yet the party not be able to show it. . . . So a trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of the *cestui que trust*, but whatever benefits or profits are obtained will belong exclusively to the *cestui que trust*. IN SHORT, IT MAY BE LAID DOWN AS A GENERAL RULE THAT A TRUSTEE IS BOUND NOT TO DO ANYTHING WHICH CAN PLACE HIM IN A POSITION INCONSISTENT WITH THE INTERESTS OF THE TRUST, OR WHICH HAVE A TENDENCY TO INTERFERE WITH HIS DUTY IN DISCHARGING IT."

Story's Eq. Jur., Sec. 322, Vol. I.

And we have seen that the same principle applies to any transaction by which the interests of the *cestui que trust* are sought to be sacrificed, no matter whether it be by sale or judicial proceedings.

The three primary duties of trustees are:

1st. To obtain possession of the trust property.

2d. To defend the title to such property, when it is attacked.

3d. Under no circumstances, to set up an adverse title to the trust estate.

Perry on Trusts, Sec. 433, also Secs. 330, 328.

Lewin on Trusts, Ch. XIII., Secs. 21, 22, 24, 25, pp. 252, 253.

"Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust*. Nor can he deny his title. If a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust. . . . A trustee must assume the validity of the trust under which he acts until it is actually impeached, although he may have some suspicion that there may have been fraud or collusion in the appointment and settlement. So, if a trustee obtains a knowledge of facts that would defeat the title of his *cestui que trust* and give the property over to another, he is not justified in morals in communicating such facts to such other person. His duty is to manage the property for his *cestui que trust* and not to keep his conscience, or betray his title or interests, and he can make no admissions prejudicial to the rights of his *cestui que trust*, nor can he use his influence to defeat the purposes of the trust as declared by the creator of it."

Perry on Trusts, Sec. 433, Vol. I. (2d Ed.).

Story's Equity Jurisprudence, Vol. I., Sec. 321, in treating of the relations of trustees and *cestuis que trust*, under the head of Constructive Fraud, says:

"In this class of cases, the same principles govern as in cases of guardian and ward, with at least as much enlarged liability of application, and upon grounds quite as comprehensive. Indeed the cases are usually treated as if they were identical."

And in Sec. 317, in treating of the relation between guardian and ward, under the same head:

"It is obvious, that during the existence of the guardianship, the transactions of the guardian cannot be binding upon the ward, if they are of any disadvantage to him: and indeed the relative situation of the parties imposes a general inability to deal with each other."

In *Williams* vs. *Gibbs, et al.*, 20 How. 538, the Court say: "The duty of a trustee, whether of real or personal estate, to defend the title at law or in equity, in case a suit is brought against it, is unquestioned."

See also Story's Eq. Jur., Vol. II., Sec. 1275.

If the trustees could have been considered in any sense as parties to the Connecticut suit, then the judgment and decree obtained in that case, directing the disposition of the property mainly for the benefit of themselves in their individual capacity, and the representative capacity of two of them, would have constituted a constructive fraud upon the complainants.

"Fraud, indeed, in the sense of a Court of Equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another."

Story's Eq. Jur., Vol. I., Sec. 187.

And such a judgment and decree would be set aside by the Court.

See *Freeman on Judgments*, Sec. 486. "While the courts of equity in England, and in the several States of this Union have uniformly refused their aid in all cases where their action would involve either the usurpation of appellate jurisdiction, or the granting of a second opportunity of presenting a case upon its merits, they have, on the other hand, uniformly extended their beneficent principles and their varied and efficient means of relief over a large and well defined class of cases, to the end that no man should retain an unconscientious advantage procured by him in a *court of law or equity*, through his own fraud, or through some excusable mistake, or unavoidable accident on the part of his adversary."

"But where there was a distinct and decided fraud in the proceedings by which the judgment at law was obtained, as by putting in testimony which the party believed to be false: by giving no notice of the suit, or one calculated to mislead the defendant and thus deprive him of an opportunity to be heard on the trial at law; or in any similar mode making the trial at law fictitious or fallacious; and also when the defendant at law, through accident or mistake, and without default in the proper degree of watchfulness and care required of careful men in their own concerns of equal importance, fails to present his defence fully, courts of equity will in their discretion grant relief," &c.

Also, Kerr on Fraud and Mistake, pp. 43, 44, above cited.

And as we have seen, the same principles govern in dealing with judgments and decrees in equity, where the elements of fraud, actual or constructive, exist, as in the case of judgments at law.

In *Myer* vs. *Butt*, 44 Ga. 468, 471, the Court say: "We recognize fully the principle that a judgment between the parties is conclusive on the subject of

dispute, unless attacked for fraud, and we agree that, generally, a trust estate is bound by a judgment against the trustee. But we do not agree that this rule applies to a case where, by the very nature of the suit, *it is the interest of the trustee to have the judgment rendered.* Nothing is better settled than that a trustee can do no legal act binding the trust estate in his own favor. . . . In obtaining this judgment he stands precisely in the position of a man who receives from a trustee the trust effects, knowing that the trustee is misapplying them. In such a case the law *implies* fraud, no matter how free from duplicity or immorality, in intention, the receiver of this misapplied trust fund may be."

See also Huntt *et al. vs.* Townshend, 31 Md. 336; "The jurisdiction of courts of chancery to set aside decrees obtained by fraud on an original bill filed for that purpose, has long been unquestioned."

Freeman on Judgments, Sec. 486.
Wright *vs.* Miller, 1 Sanf. Ch., 103, 120.
Whittemore *vs.* Coster, 3 Greens. Ch. 438.
Pearce *vs.* Olney, 20 Conn. 544, 554.
Dobson *vs.* Pearce, 12 N. Y. (2 Kernan), 156, 165.

Trustees cannot submit to a judgment so as to bind the trust estate.

Freeman on Judgments, §545.
Mallory *vs.* Clark, 20 How. Pr. 418.
Marks *vs.* Reynolds, 12 Abb. Pr. (O. S.), 403.
Huntt *et al. vs.* Townshend (above cited).
Bigelow on Fraud, p. 174.
Story *vs.* Nor. & Wor. R. R. Co., 24 Conn. 113.

Our prayer for general relief, in connection with our fourth reason (Record, pp. 10–11), makes this proceeding, in fact, an original bill to set aside the decision in the case of *Colt* vs. *Colt*, or to restrain its use in defence, on the ground of constructive fraud, if it could be held as in any manner standing in the way of our recovering our rights under the will.

In the view last above stated, if our trustees had been in any sense parties to the suit, it would have been also an instance of a trial had under the influence of mistake, surprise and accident. For this reason the complainants should be relieved therefrom, and the case should be decided upon its merits.

Story's Eq. Jur., Vol. I., § 110, defines mistake as follows: "This is sometimes the result of accident in its large sense; but as contradistinguished from it, it is some unintentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence."

If the defendants had a right to appear against us and oppose our claim, then we were laboring under a great and deplorable mistake in the matter, the consequence of which we have already called attention to.

If they had no right thus to appear and oppose us, then there was a grave mistake on their own part, attended by the same result.

It is, therefore, plain not only that the respondents could not safely or consistently take any other position than that set out in their answer, viz.: that they were not parties to the Connecticut case and judgment; but that if any other ground were taken, to the effect

that they were in any way or manner parties to that proceeding, the judgment rendered therein could not in equity be held binding upon these complainants, but on the contrary should, if necessary to a full hearing of their case and the protection of their rights, be set aside and declared to be of no effect as against them, or that the defendants should be restrained from setting it up as a bar to this suit.

Nor were the cestuis, who were minors at that time, properly made parties to the suit of Colt vs. Colt.

The *cestuis* who were summoned as defendants, and who were minors, could not appear, and answer or plead, excepting by *guardians ad litem*, duly appointed; and no guardians *ad litem* were appointed in the case.

(Record, p. 64, 69.)

In Macpherson on Infancy, p. 397, on the subject of "suits in equity against infants," it is said:

"By this guardian (*ad litem*) the infant, of whatever age, sex, or condition, puts in a demurrer, plea, or answer, for without the guardian the defence would be irregular."

So in 1 Smith's Chancery Practice, it is stated: "In filing a bill against an infant, he alone is made a party to the record, and enters his appearance, but he cannot plead, answer, or demur, until a guardian has been assigned to him for that purpose."

See also Cost *vs.* Rose, 17 Ill. 276.
Hough *vs.* Canby, 8 Blatchford, 301.
Newman *vs.* Kendall, 2 A. K. Marshall, 234.

Irons *vs.* Crest, 3 do. 143.
Shields *vs.* Bryant, 3 Bibb. 525.
Heirs of St. Clair *vs.* Smith, 3 Hammond (Ohio), 364.
Robertson *vs.* Robertson, 2 Swan, 197.
Lee *vs.* Jenkins, 30 Miss. (1 George), 192.
Colman *vs.* Northcote, 2 Hare, 147.
Freeman *vs.* Carnock, Dickens, 439.
Blevin *vs.* Burdick, 1 Hill, 134.

The probate guardian of the infant *cestuis* denies that she authorized any appearance in the case, or that she was there represented, preferring, as she did, to leave to the trustees the protection of the rights of the *cestuis*. But had she appeared, it would not have cured the defect.

In *Shields* vs. *Bryant* (above cited), after referring to the fact that no guardian *ad litem* had been appointed, the Court say: "The general guardian of the person and estate is not authorized to defend, and certainly no other person, without having been appointed by the Court, can be authorized to do so."

Also, Redf. on Wills, Vol. II., p. 437 (2d Ed.):

"And it seems to be the settled practice of the Courts not to recognize the appearance of the general guardian for an infant, without a special order for that purpose." And such an order must, of course, be one appointing him guardian *ad litem* in the case.

See also Mathewson *vs.* Sprague, 1 Curtis, C. C. 457.
O'Hara *vs.* MacConnell, 93 U. S. 150, 152.

The alleged appearance of H. C. Robinson, Esq., as counsel for the cestuis.

It is contended by the defendants, by way of excusing themselves for the course pursued by them in the case, that Henry C. Robinson, Esq., then a young lawyer of Hartford, appeared for the probate guardian, and for the *cestuis*, and made an argument in defence at the last hearing.

It appears from the testimony that Edward D. Colt (now deceased), who attained his majority during the progress of the case, did authorize Mr. Robinson to appear *for him* and on his account in the case. (See Evidence of Henry C. Robinson, Record, p. 101.)

On examining the record of the case, we find no written or formal appearance entered for the *cestuis*; and the nature of Mr. Robinson's position in the case is, therefore, not there specifically stated.

As for the answer put in by Hubbard & McFarland, there is no pretence of its being authorized by anybody, excepting the executors; and it is a sufficient reply to any theory of its being binding upon us, that it was put in by the attorneys opposed to us.

Mr. Robinson asserts that he was authorized to appear for the *cestuis* (except Isabella D. W.), having been employed so to do by Edward D. Colt, who he says acted for all; while the other *cestuis* and their mother deny that he was employed by or for them, or that Edward D. had authority to act for them in the employment of counsel. By the concurrent testimony of both sides, it is shown that, at the time of the alleged employment, the *cestuis* had really no need of counsel, the family being steadfastly opposed to taking the defence into their own hands, and deter-

Irons *vs.* Crest, 3 do. 143.
Shields *vs.* Bryant, 3 Bibb. 525.
Heirs of St. Clair *vs.* Smith, 3 Hammond (Ohio), 364.
Robertson *vs.* Robertson, 2 Swan, 197.
Lee *vs.* Jenkins, 30 Miss. (1 George), 192.
Colman *vs.* Northcote, 2 Hare, 147.
Freeman *vs.* Carnock, Dickens, 439.
Blevin *vs.* Burdick, 1 Hill, 134.

The probate guardian of the infant *cestuis* denies that she authorized any appearance in the case, or that she was there represented, preferring, as she did, to leave to the trustees the protection of the rights of the *cestuis*. But had she appeared, it would not have cured the defect.

In *Shields* vs. *Bryant* (above cited), after referring to the fact that no guardian *ad litem* had been appointed, the Court say: "The general guardian of the person and estate is not authorized to defend, and certainly no other person, without having been appointed by the Court, can be authorized to do so."

Also, Redf. on Wills, Vol. II., p. 437 (2d Ed.):

"And it seems to be the settled practice of the Courts not to recognize the appearance of the general guardian for an infant, without a special order for that purpose." And such an order must, of course, be one appointing him guardian *ad litem* in the case.

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mined to leave it in the hands of the trustees, where it belonged. Everything goes to show the improbability of counsel having been employed by them.

There seems to have been a great mistake about this affair. But it is not difficult to see how such a misapprehension may have occurred; so that the statements of the witnesses upon both sides in regard to the facts, and about their understanding of the matter may be correct, as they are undoubtedly intended to be.

Mr. Robinson, being retained for Edward D., and taking it for granted that the latter was empowered to speak for all — their interests in the stock and the questions involved as to each being the same — seems to have received the impression that, under and through his employment by Edward D., he was to represent the others also; while on the other hand, the remainder of the *cestuis* and their mother, recognizing the fact that he was regularly employed by Edward D. on his own account, but not supposing that he was acting also for them, conducted themselves as they might naturally be supposed to do under such circumstances. Mr. Robinson, however, interpreted what they said and did, or rather what they *omitted to say and do*, upon the theory that *they knew* that he was assuming to appear and act for them all. All their conduct, however, as shown in the evidence, is readily explained and intelligible, upon the theory that they regarded him as the counsel of Edward and not of themselves. Thus a mutual misapprehension probably arose, as to the respective positions and conduct of the parties on either hand.

The testimony of Mrs. Colt, the mother of the *cestuis*, clearly shows that she had no idea of employing Mr. Robinson, or that he was acting as counsel for her or for her children generally.

She says that during this litigation she did not wish to employ counsel, but that she relied upon the executors and trustees.

See her testimony (Record, pp. 163–4–5–6).

Answer 3. "I never employed, or caused to be employed, Henry C. Robinson, in behalf of my children or myself, in the James B. Colt suit; I left that suit for the executors to defend, thinking that they were bound to protect the interests of all legatees under the will, including those of my children."

Int. 13. "Please to state whether you had a conversation with Governor Hubbard, before the trial of the demurrer in the James B. Colt case, in relation to the question whether you would oppose Judge Colt's claim in that case; and if you had such a conversation, please state what it was?"

Ans. "I had such a conversation about a year after Colonel Colt's death: Mr. Hubbard asked me if I did not intend to oppose the Judge's suit in behalf of my minor children. I replied, 'No'; and he said, 'Why not?' I said, 'Because my children's interests, as I understand, are identical with those of the other legatees. It is the intention, I believe, of the executors to oppose his claim, to the best of their ability, consequently my children's interests will be protected sufficiently.' He said that my opposing it personally, would strengthen the case against him; that my children's interests were involved in the suit. I said, 'How?' and he replied, 'By decreasing the general residuum.' I said that would only make a difference to them of a few shares of stock; and he said that those were worth contending for. I replied, 'You will attend to that, and I wish to avoid making a personal enemy of Judge Colt, if possible.' Mr. Hubbard never hinted to me that my children's interests were further endangered, or that there was any possibility of their being endangered, in any way that they would not be protected by the executors and trustees."

See also Ans. 14. "He said that it was his intention to oppose Judge Colt's suit; that very able counsel had been employed, naming Judge Curtis. He further said that Judge Colt had no case; that no one but a fool or a madman would ever think of bringing such a case into court; but that if such was the Judge's intention, that they would defend it to the best of their power."

Ans. 15. "He said that the interests of all the legatees were one and identical. That they were all included in the suit opposed to Judge Colt. And he said that they would all be protected by the executors. That the more opposition, the stronger would be the defence."

Henry C. Robinson says (Record, p. 102):

"He (Edward) came in with the copy of process when it was served, and advised me that the family wished me to make an appearance, *but neither to support or oppose in their behalf* Judge Colt's claim to residuary stock."

"Mr. Macfarland, of counsel for the estate, called upon me and insisted that in his judgment the children of Christopher Colt had an interest larger than their share in Judge Colt's interest in the residuary stock, and that the amount coming to them under the codicil was very likely to be unfavorably affected by the overruling of the demurrer."

"This I communicated to Edward D. Colt, who still refused to allow me to act for himself and brothers against the claims of James B. Colt, placing it upon the grounds of the superior advantages of family harmony, and the feelings of James B. Colt in the matter."

"I took no further action in the case until the case returned to the Superior Court, after the first decision of the Supreme Court on the demurrer."

This affords us some opportunity of testing the clearness of Mr. Robinson's recollection, at this distance of time, in regard to these transactions.

He would have us to understand that he communicated to the family of Christopher Colt that they might lose *the whole of the residuary stock, which amounted to more than the primary legacy of 500 shares*, and that he was told in reply that "*the superior advantages of family harmony*" were sufficient to counterbalance this and restrain them from defending their claim to this property.

Can it be that Mr. Robinson is correct in his impression that he made such a communication, and received such a reply? Or is it not more likely that Mrs. Colt and her children, without any very distinct idea of the case or what it involved, took the view that the defence of their interests in this particular devolved upon the trustees, could only be attacked through them, and when thus attacked, would be necessarily defended by them. And yet, taking the statement, even as it is put by Mr. Robinson, it would simply show a steady adherence on the part of Mrs. Colt and the brothers of Edward not to employ the services of counsel in the case.

The same remarks may be applied to the testimony of Gov. Hubbard upon this point. See his evidence (Record, pp. 109, 110).

"The claim of Judge Colt was raised on demurrer to the bill. Whilst the demurrer was pending, or before, I cannot say which, I sought an interview with Mrs. Christopher Colt, who was then guardian of her minor children. I told her that I had heard she and her children were in combination with Judge Colt to sustain his claim, and that if this were so, I thought she and they were acting in direct hostility to their own

interests. She said in reply that the family had consulted in the matter, and they did not wish to be considered in opposition to Judge Colt's claim, as Judge Colt was an uncle of the children, and if the Court concluded to give Judge Colt an interest in the stock, they had no objections. I said to her if the Judge's claim shall be sustained it will be very damaging to the interests of your children, and, whilst I have no right to dictate advice, I fear it will be found in the end that you have made a mistake."

. . . . . .

. . . . . .

"The Judge's suit was brought June 1, 1864, and argued and decided, if my memory serves me, February, 1865. Mr. Robinson did not act in the argument of the case."

And again, in the letter of Gov. Hubbard of May 11, 1866 (Record, p. 90), he says:

"I always regretted that your family did not see fit to oppose Judge Colt's first claim."

Gov. Hubbard says he told Mrs. Colt, "if the Judge's claim shall be sustained it will be very damaging to the interest of your (her) children." Would he have us to understand that he gave Mrs. Colt clearly to understand that a decision in favor of Judge Colt, upon the demurrer would involve the loss to her children of the large amount of property comprising their share of the residuary stock, and that she said in reply, that "*they had no objections?*" If he did not so tell her, then her reply could have no effect, as in that case it was not made upon a correct knowledge of the subject. If Gov. Hubbard thought that such would be the effect of a decision like that referred to, it is plain that he ought so to have informed her, when assuming to communicate to her a knowledge of the proceeding as a basis for her action. But we are even told that the Court itself made a decision upon Judge Colt's claim, which, according to Gov. Hubbard, in-

volved the loss to the *cestuis* of their share of the residuary stock "as a logical necessity, *though the Court did not then know it.*" If the trustees or any of them even supposed such an effect possible, we may well ask why it was not presented to the Court, so that it might not happen that when they made their decision, "they did not then know it." And yet Gov. Hubbard and Mr. Robinson, depending upon their recollection, now think that they understood this before the hearing on the demurrer, and intimated it to Mrs. Colt. From the nature of her replies and from the fact that the Court were in the dark in regard to apprehending any such unfortunate effect of their decision, is it not pretty plain that the recollection of these gentlemen is not entirely reliable upon the subject, and that Mrs. Colt's statement of the matter must be the correct one?

And yet, taking Gov. Hubbard precisely according to his account of the matter, it shows, not that Mrs. Colt wished to appear or authorize the appearance of any counsel in the case, but that on the contrary she did not wish to do so, and, consequently, had no need of counsel. And, in fact, Mrs. Colt's view of this matter is and was strictly correct, that it was not for her to defend the claim of the trustees or of the *cestuis*, but that it devolved upon the trustees themselves. Her testimony shows that there never was any combination between herself and Judge Colt, or any other party, to defeat the title of the trustees to the residuary stock, which they never doubted was given to them by the will; but if Gov. Hubbard *imagined* that there was any such combination for such a purpose, so much the more was it the duty of the trustees themselves to protect strenuously their own title and that of their *cestuis;* just as in *McGachen* vs. *Dew*, 15 Beavan, 84 (before cited), the Court say with reference to the duty of trustees to take possession of and protect the trust stock

against the design even of a party in interest to change or affect it unwarrantably. "*Still more was it their duty to do so, if they became aware of any circumstance that was likely to prejudice or affect this fund.*"

Thus the testimony of *both sides* concurs in showing that, at the outset, and at least during nearly the whole progress of the case, Mrs. Colt and her children did not want any counsel in the suit, and had no occasion for any — Mr. Robinson himself testifying that he was to do nothing in opposition to the plaintiff's claim.

Is it reasonable then to believe that they did employ Mr. Robinson as counsel under these circumstances; or is it more reasonable to believe that they are right in their statement, that they had no thought of employing him, deeming that they had no use for counsel?

Mr. Robinson admits that during all the period extending up to the September Term of the Court, 1865, a period of nearly a year and a half after the suit was commenced, and reaching to within a few months of the final decision in February, 1866, he was not authorized to do anything actively in the case as their counsel; and this, although he had communicated to them, he says, the nature of the question which was to arise, in relation to their interests in the residuary stock, and which suggestion was not sufficient to induce them to come forward in the defence. Now, if this is so, *when was it, and how was it* that Mr. Robinson was ever authorized to change his course and appear actively for these parties?

He does not say that he received any further instructions than those previously given. According to his own showing, therefore, instead of being directed to appear and contest the case, or any portion of it, in behalf of these parties, it was exactly to the contrary.

But Mrs. Colt also denies that she employed counsel in the latter stage of the case. She says, that when she first heard of this question affecting her children's interest, during the latter part of the suit, she saw Judge Colt, and that he promised to withdraw it, and that she then rested content. She saw no necessity for employing counsel, and did not employ any, for she did not think it possible the *executors* could oppose this claim.

(Mrs. Colt's Evidence, Record, pp. 166, 167.)

Int. 20. "State whether, at any time during the progress of the James B. Colt case, the communication of the fact that your children's interests in the Samuel Colt estate might be seriously endangered or impaired came to you from Governor Hubbard. From what source did you receive that communication, and what was done in consequence of it?

Ans. "Governor Hubbard never intimated such a thing to me. My son Edward told me that Judge Colt intended to bring up the point whether my children were entitled to the residuum on the five hundred shares left to them by their uncle in trust. I immediately sought an interview with Judge Colt, and obtained a promise from him to withdraw that point. And I then sought an interview with his lawyer, Mr. Chapman. Mr. Chapman said, 'Judge Colt will withdraw that point by my advice, and has already done so.' I said, 'then it will not be brought up'; and he said, 'No.' Because the executors were morally and legally bound to defend my children's interests as though they were their own; that, being trustees of the property, it was in fact the same as their own."

Int. 21. "State whether you had communication with Governor Hubbard, after the decision was made upon the demurrer allowing Judge Colt's claim, in relation to what action you would then take for the protection of your children's rights in such determinations as might be further made in that case; and if so, state what such communication or conversation was?

Ans. "I never had any such communication or conversation with Governor Hubbard. I never learned either from or through Governor Hubbard that my children's rights were endangered, further than the few shares involved. I thought the only person I had to fear was Judge Colt; and after he had withdrawn the point, I felt perfectly easy, not deeming it a possible thing that the executors could bring it up, having been told by Governor Hubbard that they were bound to protect my children's interests the same as their own. I never employed Mr. Robinson as a lawyer, not seeing the slightest necessity for my so doing, and consequently never told Mr. Hubbard that I had done so."

Le Baron B. Colt, one of the complainants, says, Record, p. 174:

Ans. 6. "Before, and during the whole progress of this James B. Colt litigation, I was most all of the time absent from Hartford, at school or college. I paid no attention to the James B. Colt litigation. At the time when my brother Edward or mother informed me that the point was raised as to the residuum on the trust stock, *I did go with my mother to see James B. Colt one evening at his house, and he then agreed not to bring up the point.*"

Gov. Hubbard says, confirming the same thing, in his letter of May 11, 1866, to Mrs. T. G. Colt (Record, p. 90):

"I could not but be struck with the fact that, after you had by remaining silent given much support to the Judge's claim, he at last turned on you, *and I have recently learned (with some regret), that you had to enter into a private arrangement with him.*"

The extent of the private arrangement was, as appears by the testimony, that Judge Colt acceded to Mrs. Colt's request not to raise any point at the hearing as to the *cestuis* interest in the residuary stock.

We submit that there is nothing in the testimony of Mr. Robinson which directly contradicts this position of Mrs. Colt, that after she saw Judge Colt and he agreed to withdraw the point, she was content with taking no action in the matter of counsel.

Mr. Robinson says (Record, p. 101): "The first member of the family who retained me was Edward D. Colt."

He further says (Record, p. 102): "I think my first interview with Mrs. Christopher Colt was just before the service of Judge Colt's petition — it may have been just after."

He further says (Record, p. 105):

A. "I am of the impression that Mrs. Colt spoke to me several times in the course of the litigation in reference to the case. I recollect distinctly speaking with her at the time to which I have already alluded, when she congratulated me or herself (I forget which) or perhaps both of us upon my being her counsel, and said that it was her first experience in law, or almost her first experience in law, I do not now recollect distinctly which. She told me that Edward had advised her *that he had retained me* in her children's matter."

The only interview which Mr. Robinson positively recollects having with Mrs. Colt occurred by his own testimony about June, 1864, or *nearly a year and a half before the point about her children's interest arose*, that not being until the September Term, 1865. (Record, p. 65.) It does not appear by his own testimony that she ever directed him to contest this point. Indeed his own testimony would seem to show that he was not employed by, and did not appear for, the general guardian.

He says (Record, p. 101): "I was originally retained in February, 1864, *for the children of Christopher Colt, etc.* The first member of the family who

retained me was Edward D. Colt." . . . . . "I was paid on account of all the children by Edward D. Colt my fees in the case of *Colt* vs. *Colt*." . . . "My retainer had no reference to the oldest daughter, Isabella." . . . . "When I was originally retained to act for the children," etc., . . . "Edward advised me that the course of his father's family in reference to the proposed litigation had not been fully decided," etc. . . . (p. 102). "I had entered an appearance there for the minor children of Christopher just before the demurrer was argued in the superior court."

Again, as to charges, he says (Record, p. 107): "The original charge, February, 1864, and all the charges, except as I make qualification afterwards, are to Christopher Colt's children."

It appears that the fees in the case of *Colt* vs. *Colt* were paid by Edward D. Colt, and nothing by Mrs. Colt and nothing by either of the other children, by Mr. Robinson's own testimony. He says (Record, p. 104): "In July, 1866, Edward D. Colt paid me for himself and his brothers $2,000—$1,000 in full for services in case of *Colt* vs. *Colt*."

This composes the substance of the testimony on this point, up to the termination of the James B. Colt case. It will be observed that all the correspondence produced by Mr. Robinson occurred at a later period.

No authority to Edward D. Colt is shown to retain Mr. Robinson for anybody but himself. *Nor could such authorization be obtained* from those who were minors. It will be seen that Mr. Robinson's authority to appear in the case, for anybody excepting Edward D. Colt, rests substantially upon the alleged conversation with Mrs. T. G. Colt. It is plain that there was a grave mistake in regard to this matter on

the part of somebody. Now is it more reasonable to suppose that Mr. Robinson is right in his impression of the matter, based as it is upon his vague recollection of what appears to have been a casual conversation with Mrs. Colt, in which he thinks she congratulated somebody, he does not know exactly whom, upon his being her counsel — while we know that he was then counsel for her son Edward, and Mr. Robinson's impression (not a very distinct one at the best) may have grown out of an allusion to that? Or is it more reasonable to believe that Mrs. Colt's understanding is correct, that she never did employ counsel, in a case in which she never thought she had occasion for any? And Mrs. Colt says that she did not know of the fact of Mr Robinson's alleged appearance for her at the time of the trial, and was not informed that he had claimed so to appear until about a year previous to the date of her direct testimony in the present case — April 3, 1880. (Evidence of T. G. Colt, Record, p. 87.)

As to the other children of Christopher Colt, except Edward D., employing Mr. Robinson, it is sufficient to say:

That it is not pretended that Isabella De W. C. DeWolf ever employed him, or any other counsel, during the whole of the James B. Colt litigation. (Mr. Robinson's Evidence, Record, p. 101.)

Samuel P. Colt, another of the complainants, who was only thirteen years old at the time of this litigation, testifies that he never knew there was such a person as Henry C. Robinson until after the close of that litigation. (Record, p. 168.)

Le Baron B. Colt, another of the complainants, who at that time was a minor, testifies that he was at school

or college during the pendency of the suit, and that he did not employ him. (Record, p. 174.)

But looking to the Record, we find *no appearance there entered by Mr. Robinson:* and there is therefore nothing in the record to show how and for whom he appeared. Neither did he file any answer in the case, and so there was no authorized answer put in by anybody for the *cestuis*, or for Mrs. Colt. With what propriety could he found his intervention in the case upon an answer filed by the counsel against us, and join in presenting the case to the Court upon such a basis as that, which placed all the *record parties* in harmonious opposition to defeat our just rights?

Mr. Robinson's first testimony in this case was given August 27th, 1880, after which came the evidence of Mrs. T. G. Colt, S. P. Colt, and L. B. B. Colt in rebuttal; and then, on November 27th, 1880, Mr. Robinson again appears upon the stand and at this time produces a quantity of letters received by him from the complainants and from Edward D. Colt (*Ex. 17–66, inclusive*, Record pp. 191–209.) As his first examination took place after the direct testimony of the complainants had been taken, in which they denied his employment for them, he well knew at that time their position upon this question. He must have known of his possession of these letters, and showed no disinclination to make out the case against us as strong as possible. And yet these letters were not then produced.

After ransacking his files, it turns out that not a scrap or a line can be found written to him by any of these parties during the time of the James B. Colt case. The date of the first letter is July 27, 1867, nearly *a year and a half after the close of that litigation!* The absence of any, even the least scrap of written com-

munication to him upon that important matter during its whole pendency, is strikingly significant of his mistake in supposing that he was regarded as being their representative, as well as of the correctness of their testimony, that they had not employed him, and were not in communication with him upon the subject of their rights in that case. And a further confirmation of this is found in the striking fact that nowhere, in the whole correspondence which afterwards took place, is there a single line or word referring to or in any way recognizing his having been before that time employed in the suit for them. If he had been regarded as acting for them in that important case, some allusion to it would hardly fail to have crept into some, at least, of these numerous letters.

Contemporaneously with the last stages of the James B. Colt suit, an action was brought by Edward D. Colt against R. D. Hubbard and others, executors, to recover the accrued dividends upon his individual legacy of stock. He employed Mr. Robinson as counsel in that case. Certain compensation, spoken of by Mr. Robinson, was received by him as counsel in that case.

After the conclusion of that case, and as naturally growing out of his connection with it, and of the matter of the dividends, he was employed by the complainants with reference to minor matters connected with the management of the estate. He was not, however, employed by them *jointly*, but *individually*, and in *individual matters*. There is no sign of his having been considered as the attorney of the family generally, for any purpose whatever.

And so with reference to his being authorized to appear for them in the probate court, these letters, instead of proving, disprove the recognition by them

of any such authority, by the significant absence of any allusion thereto. It is to be remarked that, during the interval covered by these letters from 1867 to 1873, two probate settlements were made. Is it conceivable, that if he had been counsel for them in those matters, no mention of them whatever would have occurred in their letters, while, at the same time, so full a correspondence upon *other* matters is displayed?

It will also be observed that a good many of these letters relate to the interest of Edward D. Colt, and to the settlement of his estate after his decease. And in the matters of Edward D., it is admitted that Mr. Robinson was employed, and correspondence upon that subject would naturally take place.

Six of these letters are from Edward D. Colt, and throw no light upon the points here in dispute.

Twenty-two are from Le Baron B. Colt. The first eleven, embracing the period from September, 1868, to June, 1872, relate, with one exception, solely to Edward D. Colt's affairs, and mainly to the settlement of his estate. The exception is the letter from Berlin, dated January 13th, 1870, which begins as follows: "*While I am away*, I desire you to keep a general lookout over *my interests* in Hartford. Though I have no immediate apprehension, yet our family are so little in harmony that I shall feel more at ease if I know some one is keeping an eye on what transpires." (Record, p. 128.)

If the complainants understood that Mr. Robinson had been and was their attorney at this time, and up to 1873, why should one of them use such language as "*While I am away*, I desire you to keep a general lookout," etc.? And the language employed shows plainly enough that he regarded Mr. Robinson as

called upon to act for him individually, and not as counsel for the family. In fact, the letter states, substantially, that it was as against the influence of the distracted family counsels, or of the want of action on the part of the family, that Mr. Robinson was to act.

Of the remaining letters from Le Baron B. Colt, one relates to Edward B. Colt's matters, two to the rumor that Judge Colt might again attempt trouble about the trust fund, and the rest mainly to negotiations for the sale of Armory stock, or loans upon the same.

The sole letter from Mrs. T. G. Colt (Record, p. 204), consists only of a few lines, approving Mr. Robinson's acts under a power of attorney, which related to *Edward D. Colt's estate*, and refers to no other matter, whatever.

Of the thirteen letters from Samuel P. Colt, the first three are about sending the money Mr. Robinson was about to receive, on account of Le Baron B. Colt, under a power of attorney in force the year he was abroad. The next four relate to the drawing of a lease; and the remainder are in the main about a mortgage.

The seven letters from Mrs. I. C. DeWolf relate, principally to an inquiry about transferring the trust under the Connecticut statute to a trustee living in the state where she then resided.

The second probate account was settled Aug. 5, 1870. (Record, p. 149.) The complainants about this time were in correspondence with Mr. Robinson, and yet no allusion is made to his appearance in the probate court.

Gov. Hubbard writes to the complainants (Record,

pp. 122–3) the date when the account will be settled, and asks what disposition shall be made of their portion, making no reference to Mr. Robinson. Three of the complainants (Record, p. 123) reply, saying they cannot be present, and asking Gov Hubbard to remit directly to them, which he accordingly does, and obtains receipts from them; no mention being made of Mr. Robinson.

Le Baron B. Colt, one of the complainants, executed a power of attorney to Mr. Robinson for use the year he was abroad; consequently Mr. Robinson receipted for his share (Record, p. 120); Samuel P. Colt writes Mr. Robinson for this money, which he sends. (Record, p. 201, Ex. 43 and 44.)

Now if it was generally understood that Mr. Robinson was acting for all the complainants at this settlement, how did it happen that Gov. Hubbard did not communicate with him and discuss the subject, if not through him as counsel, at least conjointly with him, in seeking to arrange the matter with his alleged clients?

It is well understood that such is a usual method of conducting legal business with parties who are represented by counsel, and that professional courtesy usually indicates this as the course to be adopted. In this latter quality Gov. Hubbard was, of all men, least likely to be wanting, and if Mr. Robinson had really been the well understood professional representative of the *cestuis*, he would on all occasions have recognized it, and acted accordingly. It is plain that there was always something wanting in the alleged authority of Mr. Robinson as the counsel of the *cestuis*, and as to his being empowered to speak and act for all. Gov. Hubbard does not refer to him in his communication, nor do the *cestuis* in their replies, and his al-

leged connection with the subject matter received not even a passing notice.

The record of the probate court (Record, p. 149) does not recite that Mr. Robinson appeared for any of the complainants other than Le Baron B. Colt. He may have felt authorized to appear for him under the special power of attorney referred to.

As to the final settlement in January, 1873, we meet here with the same proof, viz.: correspondence with some of the complainants upon other minor matters, and yet no reference to his appearance at the settlement; correspondence between Gov. Hubbard and the complainants at this time, and yet no reference by him or them to Mr. Robinson's power to act at the settlement; nor does the decree of the probate court recite that Mr. Robinson appeared at this settlement. (Record, p. 153.)

Mr. Robinson was paid in July, 1866, $1,000 by Edward D. Colt in full for services in suit of *Colt* vs. *Colt* (Record, p. 104). In the suit of *Edward D. Colt* vs. *Hubbard et al.*, he deducted, in January, 1867, $2,500 for services. Of course this amount was not for services in the James B. Colt case, for he says (Record, p. 104): "In July, 1866, Edward D. Colt paid me for himself and his brothers, $2,000; $1,000 *in full* for services in case of *Colt* vs. *Colt*, and $1,000 on account of suit of *Colt* vs. *Hubbard*," to wit, the dividend suit. He then goes on to show that in this latter suit of *Edward D. Colt* vs. *Hubbard et al.*, he was to receive further and large compensation, if he should succeed upon re-argument in recovering the dividends upon the residuary stock, otherwise he was to receive nothing more. He says (Record, p. 105): "It was agreed that, if I should be

unsuccessful in that application, the $1,000 should substantially pay me for services *in that case;* but, if I succeeded in getting the advice changed in our favor upon the residuary stock, they should be *largely increased.* I did succeed." And upon recovering the amount, he retained, it seems, $2,500. This amount was therefore received by Mr. Robinson for his services in the back dividend case.

The affair was arranged by Mrs. Colt's attorney in fact (George D. Colt), and Mrs. Colt, not being herself a party to nor actively engaged in any suit for the dividends, actually *thought there was no suit in court on the subject*, but that it was settled in some other way. (Record, p. 88.) It is noticeable that when she wished to consult a lawyer she did not think of applying to Mr. Robinson at all, but wrote to Mr. Chapman. "I considered Mr. Chapman my lawyer," she says, "and I consulted with Mr. Chapman and not with Mr. Robinson when any difficulty arose. I wrote Mr. Chapman about the back dividends." (Record, p. 88.)

If, at the close of the dividend suit in favor of Edward D. Colt, in consideration of the fact that its result enabled the collection of the back dividends belonging to the brothers of Edward D., as well as of his own, an arrangement was then made by which the two counsel therein (Mr. Robinson and Mr. Chapman) were paid out of the amounts, the collection of which were thus effected; it proves nothing, whatever, in regard to the employment of Mr. Robinson in any other matter. According to his own statement, if he had failed upon the re-argument in Edward D. Colt's case, he would have had nothing from Mrs. Colt or the other children whatever; and nothing more than he had already been paid by Edward D.

The check given by Mr. Robinson to Mrs. T. G. Colt's order, it will be seen was passed not to her, but to her attorney in fact, George D. Colt, and by him indorsed and collected. (Ex. No. 1, Record, p. 120.)

Mr. Jarvis is not able to testify particularly to whom the checks drawn by him were paid; but as they were made on the same day, at Hartford, and as Mrs. Colt was then residing in Bristol, and does not appear to have been present in Hartford, a similar course must have been pursued in that instance. (Record, p. 185.)

But it is difficult to see where Mr. Robinson got his pay for such services as he now thinks he was employed to render, from 1867 to 1873. In February, 1873, he received the sum of $100. (Record, p. 188.)

For what was he paid this $100? Mr. Robinson credits it on his book to "L. B. Colt, &c.," and undertakes to make a verbal explanation of what the "&c.," means. He had performed sundry matters of incidental services for the complainants individually, as we have shown, and as referred to in the correspondence produced, including sundry services, as we have seen, under a power of attorney, executed by the assignee, of the interest of Edward D. Colt, deceased, rendered at the so-called settlement of the trust account, and had been called in by somebody, although it does not clearly appear by whom, to advise about the matter of the trustee's compensation. Having in view the amount of the charge, must it not be considered, in order to render the evidence consistent, that he made this small charge of $100 on account of those matters; and not that it was intended to cover a series of services rendered for the family of Christopher Colt, jointly, as their general counsel, in the large and important matter of this estate, ex-

tending over a period of seven years — from 1867 to 1873; and including the accountings at the Probate Court during the time, and the distribution of the estate, as well as all other matters connected therewith, and embracing also those referred to in the correspondence produced?

Considering the amount of the charge (which would be just $25 a piece for each of the *cestuis*), it must be apparent that Mr. Robinson could not have deemed himself called upon to devote therefor as much of his valuable time as would have been required for a proper examination of the voluminous accounts of the executors and trustees, to say nothing of other services.

In view of the whole testimony upón the question of Mr. Robinson's employment, we submit that the evidence convincingly indicates that he labored under a mistaken impression in supposing that he was authorized to appear in the case of *Colt* vs. *Colt*, for any other parties than for Edward D. Colt, by whom he was retained.

Nor, in fact, could he obtain legal and competent authority from the minors to appear and defend for them, since they were not of an age to give it.

No guardians *ad litem* were appointed for the minors, and in the absence of such, they were not competently made parties, and *could not* answer or defend.

The availability of the judgment in *Colt* vs. *Colt*, however, as a valid bar, does not turn upon the question of the presence in that case of the *cestuis* as parties, since the *trustees* were absent, who, as we have shown, are the proper parties in any action to

protect and defend the trust property, and in whose absence the question of the trust title could not be raised or determined.

ACCEPTANCE OF THE TRUST BY THE TRUSTEES.

THEIR PRIMARY LIABILITY TO US, BY VIRTUE OF THE GIFT TO THEM IN TRUST AND THEIR ACCEPTANCE.

THE QUESTION OF POSSESSION, AS A SUBSIDIARY ONE, EXAMINED.

As our rights depend upon the construction of the will, we necessarily assume, in presenting the remaining points of our Brief, that we have succeeded in satisfying the Court that the instrument gives to our trustees the stock for which we claim an account.

We are then simply claiming what rightfully belongs to us.

The case presented is that of a bequest to them, for our benefit, of a primary legacy of 500 shares and its corresponding proportion of the residuary stock.

The defendants say that the estate has, in the time intervening between the testator's death and the commencement of this suit, been finally settled (with the exception of 574 26–31 shares of stock which have since fallen into their hands by the expiration of the alleged life estate of James B. Colt).

Yet we have not recieved the residuary stock and its accumulations given for our benefit by the will.

This suit is brought against the trustees therefor, and for an account thereof.

The trustees having accepted the trust conferred upon them by the will, became and are responsible to us for all the property which the will gives them for our benefit.

The probate of the will by them was an acceptance of the trust therein created.

When the same person is appointed executor of a will, as well as trustee, the probate of the will by him will be an acceptance of the trust.

Hill on Trustees, *236.
Williams on Ex., Vol. II. [1287], 6th Am. Ed. p. 1396.
Redfield on Wills, Vol. III., § 85–87, p. 529–530.
Lewin on Trusts, p. 181 (6th Ed.).
Perry on Trusts, Vol. I., § 262 (2d Ed.).
Mucklow *vs.* Fuller, Jac. 198.
Hanson *vs.* Worthington, 12 Md. 419.
Baldwin *vs.* Porter, 12 Conn. 473.
Ward *vs.* Butler, 2 Molloy, 533.

And it was an acceptance of all the trusts to them for our benefit contained in the will. They could not limit their acceptance and liability to any portion to the exclusion of the rest.

"And so a trustee cannot limit his acceptance and liability to any particular portion of the trust. For if he act at all, though he disclaim a part, he will be held to have accepted the entire trust — as if one is appointed trustee of real and personal estate, and he deals with the personal, he will be deemed to have accepted the entire trust; and so if the same instrument appoints him to two distinct trusts, he cannot divide them."

Perry on Trusts, Vol. I., top page 337–8.
Ward *vs.* Butler (above cited).

"If a person has once accepted the office, either expressly or by implication, it is conclusive — and he

cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities."

Perry on Trusts, top page 379, § 268.

They are *primarily* liable to us for the trust property. If any other parties are in possession of any portion thereof, it is by a misappropriation or through a neglect of the trustees to exercise their right as such. The trustees have the right to resort to these parties, to the extent of their claim against them, for such participation in the trust property, and while the trustees are *primarily* liable to us, a *secondary* liability in our favor attaches, as against all such parties, to the extent of that right.

In this suit, where, from the necessity of the case, they are all made defendants, the Court may, if it is deemed advisable, adjust the equities between the parties.

"If co-trustees commit a breach of trust, and a third party reaps the benefit, he must also as *quasi* trustee, be made a defendant, since he is liable to be sued by the *cestui que trust*. And the equities between himself and the co-trustees ought to be settled so far as practicable."

Lewin on Trust, p. 800, 6th Ed., and cases cited.
Perry on Trusts, § 877, Vol. II.

The Gift in Trust and Their Acceptance Complete the Trustees' Liability.

The fact that the will gives them the property for our benefit, added to the fact that they accepted the

trust, and that it was feasible for them at any time to avail themselves of the gift, makes the defendant trustees liable to us for it. Nothing more is needed to complete their responsibility.

That they did avail themselves of the gift and became trustees in possession of all the property given by the will for our benefit, is also sufficiently shown by the testimony. But this was not an essential requisite to establish their liability. Under the will they had and have *a right to the property* as our trustees. No accounting on their part would be a sufficient defence, excepting an accounting to the full extent of that right. And, on the other hand, no judgment can be set up here as an estoppel, to which they were not parties as the representatives of that right, as, otherwise, the right would not be cut off or affected by it. From their acceptance of the trust to the present day, they have been the legally constituted guardians and holders of this right in our behalf, which could not be assailed in their absence — since it could only be assailed through them — and the benefit of whose active presence and best ability in resisting any attack upon it, the law thus assures to the *cestuis*, at the same time preserving thus inviolable the design of the testator, in confiding the possession and protection of this right, so long as the trust continues, in those whom he has constituted to intervene for that purpose between the hand which gave the bounty and those for whom it was intended.

Any assertion that they had not availed themselves fully of the gift in their capacity and function as trustees would be without foundation, in view of the testimony in the case and the operation of the rules of law. But were it otherwise, it would be no defence.

It would be simply to assert that, by their neglect

of our rights and their own as trustees, some portion of the trust property had been permitted to remain in or to come into the hands of other parties, while the trustees always had, and still have, the legal claim to it and are subject to the duty of its enforcement. Our claim is at all times an equitable one, and available only through or against the trustees. It is in this way that the benefit of their positive right enures to us in this action.

If they had not already done so, they could at any time, in their capacity as trustees, take and hold the property bequeathed to them from the testator's estate —and could do so now, and would be bound to do so to the extent of the stock still remaining undistributed. And, while they are holden to us for the entire trust, they may, if any other parties have, by a mistaken appropriation, received any portion of it requisite to make up their entire amount, have their recourse over against the latter, on that account. By what means can *we* be cut off from the *benefit* of these positive rights inhering in our trustees?

If, on the other hand, they have long since, by what they have actively done and by operation of law, assumed the possession of the trust property, then they are equally liable to us therefor in this action. And in either case no disposition of it, other than by accounting and transferring it to us, can be set up as a defence to our claim.

That the fact of the gift of the stock to them by the will and their acceptance renders the trustees fully accountable to us, therefor; see the following cases:

Hanson *et al. vs.* Worthington *et al.*,
12 Md. 419.

In this case a testator bequeathed $10,000 to a

trustee (who was also one of the two executors) in trust for the testator's wife for life, and afterward to certain grandchildren.

The widow having renounced the provisions of the will and taken dower, it was mistakenly supposed that the trust was thus done away with; and the executors went on and, without regard to the trust bequest, distributed the entire estate to the various legatees under the will, including the plaintiffs among others, and settled their final account and took releases, under seal, acknowledging the receipt and discharging the executors.

Two of the grandchildren now sue the trustee to recover the trust legacy — the co-executor and the other beneficiary legatees under the trust being made defendants as interested parties. The testator died in 1834; the executor's final account was rendered in 1846, and suit was not brought until 1854.

The court held that the probate of the will by the trustee was an acceptance of the trust, which could not be afterwards disclaimed or repudiated; that the legal estate vested in the trustee by the will; that it followed from this that it was his duty to receive and hold the legacy for the purposes of the trust; and that, notwithstanding the fact that the entire estate had been distributed, yet, by "operation of law, the fund *would be considered in his hands* as trustee after the time limited by law for the settlement of the estate" — although the trustee in this case had never assumed to act in that capacity. And the court also, holding that the releases to the executors would not avail as a discharge to the trustee, and that laches could not be set up as a defence, decided that the trustee was *primarily* liable, while the other parties

who had participated in the trust fund were held to a *secondary* liability.

Fenwick *vs.* Greenwell, 10 Beavan, 412.

In this case, by a marriage settlement the sum of £5,000 standing in the name of Elizabeth Cuthbertson was conveyed to trustees, who failed to have the stock transferred to their own names. They were held liable for the property after a lapse of nearly forty years, although they never had possession of it. "Cases of this description," says Lord Langdale, M. R., "are very painful and are attended with great hardship on persons suddenly called on after a lapse of years to answer for the loss of money which they have never possessed, and which, therefore, they have not personally misapplied." . . . .

"The trustees were bound to provide for the performance of all and every of the trusts of the settlement, and for that purpose to provide for all contingencies, so as to be prepared for them whenever they might happen, and be enabled to perform the trusts dependent on them whenever they might arise." As no time was mentioned for the transfer to take place, the Court say, "That the duty of the trustees arose immediately." . . . . . .

"It is a case of very great hardship; it does not appear that these trustees ever looked into the settlement: but having contracted obligations by the execution of the deed, they attempt to excuse themselves by saying that they were ignorant of the trust. This cannot avail them." The defendants were decreed to replace the stock in bank annuities.

M'Gachen *vs.* Dew, 15 Beavan, 84.

In this case, by a marriage settlement, made in anticipation of the marriage of Mr. and Mrs. M'Gachen,

the defendants became trustees of certain property comprising an amount of stock (which stood in the names of N. Stylemen and others as trustees for Mrs. M'Gachen), and which the defendants ought to have had transferred and placed in their own names as trustees under the marriage settlement. This they neglected to do; and by an unwarranted arrangement between Mr. M'G. and the said N. Stylemen and others, a portion of the same was subsequently turned over by the latter in payment for the purchase of certain freehold property.

The children of Mr. and Mrs. M'Gachen now sue the trustees under the marriage settlement to recover the stock. The defendants set up that they were not responsible but the said Stylemen and others were, and that if the defendants were responsible then M'G., who got the benefit of the fund, must restore it.

Sir John Romilly, M. R., held that the defendants as trustees under the marriage settlement were themselves liable. "It was their duty to cause the fund to be transferred into their own names upon the trusts of that settlement, *and still more was it their duty to do so if they became aware of any circumstance that was likely to prejudice or affect this fund.*"

The Court also held that M'G. was liable to the trustees for a restoration of the fund, and that the latter might recoup out of dividends in their hands belonging to M'G. to make up the amount required to replace the stock.

Platel *vs.* Craddock, Cooper's R., 481.

One Greenway settled upon his daughter (the plaintiff, Catherine Platel) £2,000, the defendant Craddock being appointed trustee. The subject of the settlement was a promissory note for that sum, made by G. Greenway, payable to the defendant as trustee,

who was directed to compel payment unless the husband should direct it to remain. The date of the settlement was in 1824. In 1835 this suit was brought by George and Catherine Platel and their infant son against the trustee, to recover the fund. The defendant set up, in his answer, that they had never consulted with him as to the trusts, that he was unacquainted with the matter, and that the circumstance of his becoming trustee had even passed out of his recollection until 1834, when he received a letter from George Platel, the husband. That the latter and George Greenway were professional men, and defendant thought they would do what was right about the settlements, etc., etc.

The trustee was held liable for the fund; and the Vice Chancellor further said, that "The bill might undoubtedly have been so framed as to have asked payment of the £2,000 out of the estate of Greenway, and the usual accounts of that estate, and it might have sought to make the trustee liable only in the event of there not being assets of Greenway; but, nevertheless, the plaintiffs had full right, if they pleased, to proceed against the trustee at once, and solely, leaving him to reimburse himself if he could, principal, interest and costs, out of the property of the settlor."

Caffrey *vs.* Darbey, 6 Vesey, 488.

Here the defendants became trustees, under a marriage settlement, of a certain public house and leasehold, which they were directed to sell, and raise £800, and invest the same; but so long as the husband should pay £100 a year toward the amount, he might keep possession.

The latter paid, at different times, £250, and no more. The trustees did not take possession. Finally

the husband became insolvent, and the property, under the English bankrupt law, became involved in his estate, and was lost to the trustees.

The suit was brought in behalf of the children, who were entitled, under the settlement, and who seek to recover the whole amount of the property from the trustees. The latter were held liable for the whole fund, including that of which they had failed to take possession.

In *Booth* vs. *Booth*, 1 Beav. 125, 129, a testator bequeathed to his executors and trustees certain personal estate, to put and place the same at interest upon good security, etc., and pay over the income to his wife and children. The trustees did not take possession of the property and carry out the trusts; but Batkin allowed his co-executor, Booth, to carry on business with the funds until 1830, when Booth became embarrassed, and the capital was lost. Upon a suit by the *cestuis* against the trustees for an account of the executors' estate, and to recover the trust property, the Master of the Rolls says: "On the 26th of October, 1830, the two executors proved the will; they take on themselves the trusts and the duty of performing it. *From that moment, it was their duty* to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin unfortunately did not consider that, by proving the will, he had undertaken any duty or incurred any responsibility. He says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty, or to be responsible for anything. It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which by proving the will he has undertaken. I am of the opinion that he became liable

for the performance of the trusts, and for any consequences arising from a breach of them."

Freeman *vs.* Cook, 6 Ired. Eq., p. 378.

The Court says: "In Doyle *vs.* Blake, 2 Sch. and Lefr. 243, it was admitted that the defendant, who was an executor, meant to act honestly, but had received wrong advice. Lord Redesdale said: 'The Court must proceed not upon the improper advice under which an executor may have acted, but upon the act he has done. If under the *best* advice he could procure, he acted wrong, it is his misfortune; but public policy requires that he should be the person to suffer.'"

See also Dix *vs.* Burford, 19 Beav. 409–13.
Mucklow *vs.* Fuller, Jac. 198.
Wiles *vs.* Gresham, 2 Drewry, 258.

Defendants were, however, trustees in possession. This examined as a subsidiary question.

The question whether the trustees, before the Connecticut case of *Colt* vs. *Colt* arose, had assumed and held the trust property as such, or, indeed, whether they have exercised that right and performed that duty up to the present time, cannot consequently be exalted into prominence as exercising any determining effect upon our claim. But perhaps it is our duty to bring out, in as definite a form as possible, the exact state of affairs attending the various stages of the transactions which have been had in the matter of this trust.

And in that view we ought, perhaps, to observe here how entirely without foundation would be any pretence that they had not become trustees *in actual possession* of the trust property.

As the trustees and executors were in this case identically the same persons, the duty was thus imposed upon them, having accepted the trust, to assume the possession, as such, of the trust property, at the earliest possible day.

We submit that they must be presumed to have done so.

The first duty of a trustee is to take possession of the trust property.

Perry on Trusts, Sec. 438, Vol. I., p. 525, (2d Ed.).
Lewin on Trusts, p. 254 (6th Ed.).

The Supreme Court of Connecticut, in *Colt* vs. *Colt*, decide that such a legacy was payable before the commencement of that suit.

"The estate," they say, "was probably larger than any ever before settled in this state. *Prima facie* it was the duty of the executors to pay the legacies more than a year before the date of the petition."

32 Conn. 450–1.

In the case of *Stevens* vs. *Gaylord*, 11 Mass. 256 (cited in note to Williams on Executors, ft. p. 1310), the Court enunciate the rule that "when the same hand is to pay and receive money, that which the law required to be done, *shall be deemed to be done*." And there is no reason why a similar rule should not govern with reference to this legacy of stock held by the

same parties exercising the double capacity of executors and trustees.

See also M'Gachen *vs.* Dew (already cited).

Again, where a legacy is given to an executor as trustee, it passes, even in the case of a pecuniary or general legacy, into the hands of the trustee as such, at least as soon as any part of the assets are set apart for that purpose, or whenever the trustee, by any clear and unequivocal act, assumes his relation as such.

In *Perry on Trusts*, § 263, the author holds language which might seem to indicate that the decisions in this country upon the subject of the vesting of trust property in trustees who are also executors, have not been entirely uniform. He says:

"In England the rule seems to be, that if the executor assents to the legacy, if it is specific; or if part of the assets are clearly set apart and appropriated by him, to answer a particular legacy; he will be considered to hold the fund as trustee of the trust, and not as executor."

And then adds:

"In jurisdiction where executors and trustees are required to qualify and give bonds, it has been held that an executor, who is also a trustee under the will, cannot be considered as holding any part of the assets as trustee, until he has settled the account at the probate office as executor, and has been credited with the amount as executor with which he is afterwards to be charged as trustee. In other cases it has been held that the change of property from the executor to the trustee, when they are the same persons, may be shown by some authoritative and notorious act," etc., etc.

The author does not undertake to state what the rule is, or even give an opinion upon the subject; but contents himself with saying that, in the jurisdictions referred to, the matter had been decided in these two different ways. He cites the cases upon which his statement is founded, and, of course, his expressions amount to no more than a recitation of these decisions.

In support of his first statement, above quoted, he cites three cases, two of them occurring in Massachusetts, and one in Alabama, viz.:

Hall *vs.* Cushing, 9 Pick. 395.
Prior *vs.* Talbot, 10 Cush. 1.
Perkins *vs.* Moore, 16 Ala. 9.

Now, the case last referred to — *Perkins* vs. *Moore* — not only fails to support the statement, but decides directly the contrary; holding that the only thing necessary to show that the trustees are in possession, as such, and not as executors, is the evidence of some plain and unequivocal act on their part as trustees.

"The correct rule on this subject," says the Court, "is that the executor shall be considered as holding the legacy in his character as executor, unless it clearly appears from the will that the testator clearly intended it should be held by him as trustee and not as executor." . . . "But that they have elected to hold the fund as trustees and not as executors must be made to appear by some plain and unequivocal act"; and the Court found not only an absence in that case of any act on the part of the trustees, as such, but a plain election to hold as executors."

The other two cases cited arose in Massachusetts. And we do not find any cases which tend to support the statement referred to, except in the States of Massachusetts and Maine. But the statutory provision

upon the subject of trustees' bonds in these two states differs from those of Connecticut and other states in an important particular. In Maine and Massachusetts, the statutes make the giving of a bond by the trustees a *prerequisite to their assuming that function*. Before they enter upon their duties as trustees, such bond must be given.

The Massachusetts statute provides (*General Statutes of Mass., p. 500, Chap. 150*):

"SEC. 1. Every trustee, under a will, except such as are exempted, as hereinafter provided, shall, *before entering on the duties of his trust*, give bond, with sufficient surety or sureties, to the Judge of the Probate Court for the county in which the will is proved, and in such sum as the Judge orders, with condition substantially as follows (except as provided in chapter one hundred and one)."

Such is also the language of the statute of Maine, *(Maine Rev. Stat. of 1857, p. 434, Chap. 68)*:

"SEC. 1. Every testamentary trustee, except those hereinafter exempted, *before entering on his duties*, shall give bond to the Judge of Probate," &c., &c.

These statutes, it is seen, distinctly require that the trustee shall give bond before he can in any way commence his duty as such, and so, in certain cases (and notably those in which it is sought to escape liability upon the *executor's* bond without having given bond as trustee), might be considered as determining the question of the official character of anything done by him previous to giving bond in the latter capacity, on the ground that this must have been done *before* his capacity of trustee can be commenced.

We know that in Connecticut a different rule is

established, for in the case of *Bull* vs. *Bull*, 8 Conn. 48, where a devise and personal bequest was given to trustees, who were also executors, the Court held that:

"By the rules of law, the estate given *on the testator's death* vested in the executors, James and Thomas Bull, *as trustees*, for the use of the brothers and sisters and their children, to be by them enjoyed after the death of the widow.

See also Isham *vs.* Gilbert, 3 Conn. 166.

Upon referring to the Connecticut statutes, we find no provision making the giving of the bond a prerequisite to the authority of the trustees to act as such, but simply an imposition upon the Probate Court of the duty to put the trustees under sufficient bonds.

The General Statutes of Connecticut (*Rev. of 1866, Tit. 20, Chap. 1, p. 407*), provide:

"SEC. 26. Whenever a testator, by his last will, shall have appointed a trustee to execute a trust created by such will, the Court of Probate, having cognizance of the settlement of the estate of said testator, shall, unless otherwise provided in said will, require of said trustee a good and sufficient bond, with surety according to law, conditioned for the faithful performance of his trust."

The same provision is found in the statutes of Connecticut of 1854, and consequently was in force during the time covered by the proceedings under the will of Colonel Colt.

This provision is simply directory to the Probate Court. Their authority to require a bond they might plainly exercise at any time in the course of the administration of the trust. And it is a very different

thing from that of a provision that the trust cannot be entered upon or commenced by the trustee until after the bond has been given.

Such being the difference between the statutes of Massachusetts and Maine, and those of Connecticut and various other states upon this point, the decisions in Maine and Massachusetts cannot be looked to as furnishing the rule upon the subject.

"In other cases," says the author above quoted, "it has been held that the change of property from the executor to the trustee when they are the same persons may be shown by some authoritative and notorious act." And this we find to be more distinctly defined in *Perkins* vs. *Moore* as requiring simply "*some plain and unequivocal act*" by which they assume the relation of trustees.

This seems, in effect, to be the rule as we find it in states where the question has arisen and which are not controlled by statutory provisions like those of Massachusetts and Maine above referred to. Such we have seen it to be in Connecticut in the case of *Bull* vs. *Bull*, where the property specifically given was held to be in the possession of the executors as trustees *immediately on the death of the testator;* and it follows that it is to be taken to be the expression of the rule for the present case.

See also Perkins *vs.* Moore, 16 Ala. 6.
Drane *vs.* Bayliss, 1 Humph. (Tenn.), 174.
Swope *vs.* Chambers, 2 Grattan (Va.), 323.
Jennings *vs.* Davis, 5 Dana, 127.

Even where no such plain and unequivocal act or conduct has occurred on the part of the trustees where-

by they assume that relation and thus fix the property and possession in themselves, as such, still after the time limited by law for settling the estate, the trust property is held to be in their hands as trustees and not as executors, without regard to the question whether they have given bond as such, or even whether they have rendered any final account as executors; thus showing that neither the giving of such bonds, nor the rendering of such account necessarily precede the transmutation of the property and possession to them as trustees.

Hanson *vs.* Worthington, above cited.
Carrol *vs.* Bosley, 6 Yerger, 220.
Lark *vs.* Linstead, 2 Md. Ch. 162.

In the absence of any statute upon the subject, the rule of the common law is, that the transmutation of the title from the executor to the trustee takes place upon the doing of any unequivocal and authoritative act by the trustee, in the latter capacity. Such remains the law, therefore, where there is no statute containing words to repeal it. And where are any such repealing words to be found in the Connecticut statute?

And even in Massachusetts and Maine, with their strongly worded enactments, the Courts did not, it is apprehended, mean to go so far as to say, explicitly, that the common law rule on the subject is repealed.

It will be observed that in the cases cited in those states, the doctrine held is applied as *against* parties who claim exemption from liability on the *executor's* bonds, on the ground of his having acted as *trustee*, although no bond was given in the latter capacity.

But, suppose a bequest to be made in Massachusetts, to trustees (who are also executors) of personal property, of which the latter assume possession and collect the income, and for some years pay out and

dispose of it, under the provisions of the trust; and in the course thereof effect insurance against fire upon the property in their own names, as trustees of the *cestuis que trust?* Upon the destruction of the property by fire, could the insurance company set up that the insurers, the trustees of the particular *cestuis* named, had no title to the property, on the ground that they had not given bond as such, and settled their account as executors?

Suppose the case of a bequest of property to trustees, who are also executors, with directions, as trustees, to sell and invest in certain stock, and to collect and appropriate the income to the education of minors; and they neglect so to sell; and the stock in which they are directed to invest appreciates in value far beyond the property retained; meanwhile, they proceed for no matter what length of time, to collect and apply the income upon the retained property to the purposes of the trust.

In a subsequent suit against the trustees by the *cestuis* for an account, could the latter, to protect themselves against a claim for the difference, set up that they had not given bond as trustees, or settled their account as executors, and that, therefore, there had been no transmutation of the property and they were not trustees, notwithstanding their unequivocal and authoritative acts as such? Numerous aspects of the question might be presented in which, to hold that the trustees could avail themselves of such a doctrine, would so offend the legal sense as to be plainly inadmissible.

Probably the position which the courts in Massachusetts and Maine intended to take would be better formulated by saying that, under their statutes, the executors or their sureties could not set up the having

acted as trustees (in the absence of a bond as such), to protect themselves from liability as executors; but not that the trustees could shield themselves from responsibility in that capacity by alleging that they had not complied with the law by giving bond, etc.

In other words, that the parties sued in either capacity could not avail themselves of their own wrong as a defence.

In fact, it has been decided in the State of Maine that when a person is appointed executor and trustee, and does not give bond in the latter capacity, he will be trustee and remain such until *he is adjudged by the Court of Probate* to have declined the trust.

See Groton *vs.* Ruggles, 17 Me. 137.

The head note is as follows: "When an executor is also appointed a trustee under the will, he *remains such until*, by reason of his refusal to give the bond required by law, *he shall be considered and adjudged* by the Judge of Probate to have declined the trust." The Court say, "it must be found or adjudged by the competent authority, etc." It will be observed that in the case of *Williams* vs. *Cushing* in that state, the Probate Court had taken action upon the matter by considering the trusteeship vacant, and had appointed a new trustee.

The Connecticut statute provides that "if any trustee *shall refuse* to give such bond, such *refusal* shall be deemed a refusal to perform the duties of said trust." The Court of Probate is authorized to require a bond; and if on such requirement the trustee refuses, he shall be considered to have declined his trust. But there can be no such refusal unless the Court order the bond; and even after that, his refusal must be found by the Probate Court, and he must be

adjudged to have declined his trust for that reason. In this case the Court have never ordered a bond.

In a case, therefore, like the present, where the trustees had unequivocally assumed that relation, it can hardly be seriously contended, in defence to our claim, that they did not hold the trust property as such, and are not responsible to us in that capacity. In fact, to support the contrary would be to maintain a strange inconsistency and manifest absurdity in this case. For that would be asserting that they did not hold as trustees the 500 shares of stock given by the primary legacy. This would be in direct contradiction of the testimony. There never was any question about their being trustees of that stock. Their conduct in relation to it, and their dealing with the *cestuis* in that connection, has, at all times, been essentially that of trustees. They regularly administered the trust as to that stock according to the terms of the will, from January, 1863, and accounted to us therefor.

The will directed the holding of the stock by them *in trust*, and the profits and dividends, so far as might be necessary, to be applied by them, in the course of the execution of the trust, to the education of the *cestuis*. They held the stock as trustees — kept a separate account of the income — and regularly applied portions of it to the education of the *cestuis* in discharge of the duties of the trust as pointed out by the will.

See their account (Record, pp. 130–7).
Also Evidence of Mrs. T. G. Colt (Record, pp. 87–8).

It makes no difference that in the heading of their accounts they call themselves executors. The transactions performed by them were those of trustees. This was a direct election to hold as trustees.

In *Paramour* vs. *Yardly*, Plowd. *539, the Court held that if a legacy is bequeathed to an executor for the education of the testator's children, and he accordingly educates them, this makes the election to have the thing as legatee and not as executor.

Governor Hubbard says, "The trustees' account with the children of Christopher Colt was settled, January 11th, 1873."

Record, p. 114.

This account of the trust income appended to Gov. Hubbard's testimony extends back to Jan. 24, 1863, and covers the whole intervening time up to January, 1873. In it the dividends upon the 500 shares are regularly credited. This was an emphatic "setting apart" of the stock in their hands under the trust. Gov. Hubbard further says (Record, p. 116): "On the following day at my law office I met, for the purpose of settling the trust fund account, Le Baron B. Colt, S. Pomeroy Colt, and F. E. De Wolf, in joint conference. I explained to them as well as I knew how, and in good faith, the condition of the trust fund estate, and of its administration from its beginning up to that date." There could be no thought but that its beginning was at the beginning of the entries in the account, in January, 1863.

In December, 1862, we find the trustees considering the question of making, in that capacity, certain allowances to the *cestuis*: and Gov. Hubbard, in his letter of Dec. 6, 1862, to Mrs. Colt, says, in relation to the matter, "I desire to modify my expression a little by saying that your children shall draw, in addition to the annuities, if such addition shall be found necessary, and if, as trustees for the children, we have any power to make an allowance before the settlement of the estate." (Record, pp. 89–90.) These allow-

ances were subsequently made, and we know from the nature of the act and the statement of Gov. Hubbard above given, and from the fact of their being charged in the trust income account — the capacity in which it was done.

Upon this showing it would be vain to pretend that the trustees were not in full possession, as such, of the trust stock as far back as January, 1863. And as for the theory that they were not trustees on account of not having performed the acts referred to in the Massachusetts and Maine cases, it should be observed that, if adopted here, the strange and absurd result would logically follow that they never assumed the trust under the will, *even up to the present time*, since they have *never given any bond at all;* and so it would follow that they have never been trustees of "this trust" whose "administration," says Gov. Hubbard, "has been a long one, and not without embarrassment," and as their compensation for which, the trustees did not hesitate to charge and receive $5,500, in addition to their full pay as executors provided in the will.

See Gov. Hubbard's evidence (Record, p. 117).
Also their account (Record, p. 130).

The Trust Legacy a Specific Bequest.

In addition to what has already been presented, there is also a class of considerations bearing upon this subject, growing out of the fact that the trust legacy in this case is in its character, *a specific legacy* as distinguished from a general or pecuniary one, which of themselves would be sufficient to control the question of the transmutation of title.

The legacy is specific, it being a "specified part of the testator's personal estate, which is so distinguished."

Williams on Exrs., Vol. II. [1158], p. 1250, and note.

The fact that the amount of the residue of the stock could not be ascertained but by deducting the primary legacies therefrom, did not prevent it from being specifically given. That was merely a work of calculation, and once done, the gifts of the residue were as clearly defined as the amounts previously named.

The legacy of residuary stock was regarded as specific by the Supreme Court of Connecticut, in *Colt* vs. *Colt* (32 Conn. pp. 442, 451).

It is not a bequest of a portion of the *residue of the estate*, but of the residue of certain stock, after taking out of the whole amount of that stock the number of shares given away by certain legacies. In reply to a remark of counsel in that case, that "the share is a share of a residue," HINMAN, C. J., says: "This would probably be so, if this were a residue of the estate; but it is only a residue of certain stock."

Colt *vs.* Colt, 32 Conn. p. 442.

And again, the Court say, in their opinion in that case (see p. 451): "The legacy *is not of a pecuniary character*, but of stock in an incorporated company. The petitioner is entitled to these specific shares of stock."

The legacy is clearly a specific one, and the debts of the testator having been insignificant in comparison with the whole amount of his vast property, it was well known at the outset that this legacy was not needed for the payment of debts.

See also Isham *vs.* Gilbert, 3 Conn. 166.
Williams on Ex., Vol. II. [1162], p. 1254, and note.
Roper on Legacies, Vol. I., *191 and *204 (2d Am. Ed.), and cases cited.
Redfield on Wills, Vol. II., pp. 131, 132 (2d Ed.).

Now, in the case of a specific legacy in trust to the executor, it vests in him as trustee at the death of the testator.

Williams on Ex., Vol. II., ft. p. 1424, top. p. 1530; also ft. p. 1379, top. p. 1481 (6th Am. Ed.).
Roper on Legacies, *1250.
Longmore *vs.* Broom, 7 Vesey, Jr., 125–129.
Mucklow *vs.* Fuller, Jacob. 198.
Perry on Trusts, Vol. I., § 263.
Dix *vs.* Burford, 19 Beavan, 409.

And such is the rule in Connecticut.

"The respondents claim that the devises and legacies given to the surviving partners are specific, and therefore that they vested immediately on the death of the testator. That such is the rule applicable to specific legacies is admitted," etc.

Platt *vs.* Platt, 42 Conn. 330, 345.
Williams on Ex. [1379], p. 1481 (6th Am. Ed.).

By the extract from *Perry on Trusts*, already given, it will be seen that under the old English rule (no longer existing in most of the American States), the assent of the executor was required to effect the full transmutation of the property and possession from the executor to the trustee.

See also Williams on Exrs. [1379], p. 1481 (6th Am. Ed.).
Lewin on Trusts, Chap. XI., § 16, p. 182 (6th Ed.).

And whenever the assent is given it relates back to the testator's death and vests the legacy as from that time.

Williams on Ex. [1380], p. 1482 (6th Am. Ed.).

The executor's assent could not rightfully be withheld beyond the time when it became evident that the property bequeathed was not needed for the payment of the testator's debts. The legatee in trust, however, *became trustee* immediately on the probate of the will, and as such held the *right to the property*, and could in equity enforce the executor's assent, if improperly withheld, in cases where the trustee and executor were different persons.

"Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representative in case of his death before it be paid or delivered—and such as to be subject to forfeiture in case of the outlawry of the legatee."

Williams on Exrs., ft. p. 1, 373.
See also Roper on Legacies, *844.

"If an executor refuse his assent without cause he may be compelled to give it by a court of equity."

Williams on Exrs. [1375], top p. 1477 (6th Am. Ed).

The reason why the *transmutation* became complete on assent, was because this effected the perfect completion of the legatee's title at law (as he previously had title in equity). This was evidenced by

his being thereupon *able to sue at law* for the legacy, if detained by the executor. The *right to sue at law* involves the proposition that the legatee's title *at law* is complete; and thereupon, accordingly, in cases where the executor and trustee are the same person, there is an entire transmutation of the property and possession from the executor to the trustee.

It may be considered as established, accordingly, that the *completion* of the legatee's title at law, as evidenced by his *right to sue at law*, however effected, works the transmutation at once.

In those states, therefore, whose laws authorize the legatee to sue at law for the legacy after a certain time from the testator's death, without requiring the executor's assent, the old rule is done away with, and the title vests and is complete without it.

Upon an examination of the laws of the various states of the Union, we find that this change has been made in the large majority of them.

Such is the case in the State of Connecticut, as appears by the judicial decisions of that state. The old rule does not exist there, and the legatee may recover the legacy at law *at the expiration of a year from the testator's death.*

Judge Swift, in his digest (Revision of Swift's Digest, side p. 455), says:

"In England, the assent of an executor to a legacy is necessary to its validity at law, otherwise the only remedy is in equity; but in this state, no such assent is necessary, and whenever the legacy is payable, the legatee can maintain an action at law against the executor to recover (provided the executor has assets). It may also be recovered by an action on the probate bond."

The same author (Ib., side p. 454, top p. 460) gives the rule which fixes the time when a legacy becomes payable to the legatee, in that state, being the same with the rule of the common law.

"When no time is set in the will, the rule of the common law is that the executor shall be allowed a year from the death of the testator for the payment of legacies."

Even in the case of a general or pecuniary legacy, it has often been decided in Connecticut that the title of the legatee is valid, and may be recovered at law, whenever it has become payable as aforesaid, and it is established that the executor has assets for the purpose.

Goodwin *vs.* Chaffee, 4 Conn. 163.
Knapp *vs.* Hanford, 7 Conn. 132.
Adam *vs.* Spalding, 12 Conn. 350.
Lamb *vs.* Smith, 1 Root, 419.
Spalding *vs.* Spalding, 1 Root, 271.

This being the rule in Connecticut with reference to *general legacies* which are first liable to be laid under contribution for the payment of debts, it applies with still greater force to *specific legacies* which are not primarily liable to such contribution.

In the case heretofore referred to of *Platt* vs. *Platt*, 42 Conn. 330, the Court held that where a legacy was *specific*, it vested immediately upon the death of the testator.

So also in *Bull et al.* vs. *Bull*, 8 Conn. 48 (already cited), the Court held that in the matter of a specific devise and bequest to executors *in trust*, the same vested, *on the testator's death* in the *trustees* as such.

In the very case set up by the defendants (*Colt* vs.

Colt, 32 Conn. pp. 423, 451), it is decided by the Supreme Court of Errors of the State of Connecticut, that the title of a legatee to a legacy similar to ours is complete and available at law, and may be recovered in an action at law against the executors, whenever it has become due by the expiration of the year allowed to the executors for the payment of legacies.

And the Court say (Ib., 451):

"The legacies were payable by force of the will itself, and it required no action of the Court of Probate to give the legatee a right to recover them. It is not customary to obtain any order for their payment. That an action would lie on the probate bond for the neglect or refusal of the executors to pay the legacy, is not material." . . . .

"Swift says, that in 'this state, whenever a legacy has become payable, the legatee may bring an action at law to recover it'; 1 Swift Dig., 455. Such actions before the Supreme Court have frequently been sustained."

And after citing *Goodwin* vs. *Chaffee*, and *Knapp* vs. *Hanford*, above referred to, the Court say:

"*Prima facie* it was the duty of the executors to pay the legacies more than a year before the date of the petition."

The legatee's *title at law*, then, is complete in Connecticut at the end of one year from the testator's death. And, therefore, in cases where the executor and legatee in trust are the same person, the transmutation of the entire property and its possession from the executor to the trustee, is then effected.

Nothing more is needed to establish the fact that

the trustees held in that capacity, and were chargeable as trustees *in possession*, at least at the end of one year from the testator's decease.

If this were not so, the *cestuis* would be placed in a less favorable position than that of other legatees; when strictly speaking, their position ought to be, and in effect is, a more favorable one, in view of the fact that the same persons who are executors are also their trustees, and must be presumed to have acted for their best advantage, and to have complied with the first duty of a trustee, in acquiring possession of the trust property.

But had this case occurred in a state where the old rule existed, the result under the circumstances appearing here would have been the same. Acting in the double capacity held by them, their assent would be presumed.

Besides, their action in the premises as trustees would have constituted full assent. And, in fact, the payment to any of the legatees or *cestuis* of any portion of the income upon any of the stock bequeathed by the will, would be an assent to such legacies; and as all the legacies of this stock stand upon the same footing, an implied assent would thus have been given to all the legacies of this stock in the will.

Williams on Ex., Vol. II. [1376], 6th Am. Ed., p. 1478.
Clement *vs.* Brainard, 46 Conn. 174.
Roper on Legacies,* 848 (2d Am. Ed.).
Paramour *vs.* Yardly, Plowd.* 539.
Williams on Ex., Vol. II., ft. p. 1377–8.
Redfield on Wills, Vol. II., *561, note 3 (2d Ed.).

McClanahan *vs.* Davis, 8 How. U. S. 170, 178, 179.
Connor *vs.* Satchwell, 4 Dev. and Batt. 72, 76.
Lillard *vs.* Reynolds, 3 Ired. (N. C.) 366, 372.

These considerations with reference to the rule in the case of specific legacies render it, if possible, still more conclusive that the defendants referred to were trustees in possession under the will. And this being so, of what then were they consequently in possession?

Plainly, *of whatever is given to them by the provisions of the will and codicil under which they hold.* The extent and quantity of the property held by them as trustees, is determined only by the extent and quantity of the gift to them in the will.

Suppose a will gives to executors as trustees for us, 1,000 shares of stock, or a sum of money. They prove the will and accept the trust, and proceed from time to time, in the administration thereof, to pay over to or invest for us the income of a portion of the trust gift — say the income of one-half thereof. Could they, in a subsequent litigation arising in relation to the property, be regarded as trustees only of the portion of the trust fund referred to, and not as trustees of the whole gift? We have no apprehension that the Court will arrive at any such conclusion.

In fact, the understanding on the part of the trustees themselves, up to the time of the case of *Colt* vs. *Colt*, was that the will gave them, and that they consequently held as trustees, the primary legacy and its corresponding proportion of the residuary stock. This is shown by their position confidently taken in that case.

Up to the time of the decision upon the demurrer in that case, they had never supposed that any such rule of construction would be adopted as was applied therein in sustaining the claim of James B. Colt. They consequently, up to that time, regarded the matter in the opposite light, and must have considered themselves as trustees of the primary legacy and of the residuary stock corresponding thereto.

It was only by a mistaken application of that rule to our bequest, that the decision was afterwards obtained which they now undertake to set up as cutting off our right to the corresponding or residuary stock.

It must be conceded that, before that time, they considered themselves as holding in our behalf whatever they found given for our benefit by the will. And that they regarded this as comprising both the primary legacy and its corresponding residuary stock, is conclusively shown by the letter of Gov. Hubbard to Mrs. T. G. Colt, the mother of the complainants, of May 11, 1866, to which we have already had occasion to allude, and which it is, perhaps, better to insert entire in this connection.

He there says (Record, pp. 90–91):

"Mrs. Colt,

"DEAR MADAM,

"Yours of yesterday is received. The source of this last trouble is in the first decision made in favor of Judge Colt. That decision involves this as a logical necessity, though the Court did not then know it. This decision reduces that to a logical absurdity. I always regretted that your family did not see fit to oppose Judge Colt's first claim. I expressed that regret more than once. If your family had joined others in opposing the Judge's claim, I think this last result would not have happened. I could not but be

struck with the fact that after you had, by remaining silent, given much support to the Judge's claim, he at last turned on you, and I have recently learned (with some regret) that you had to enter into a private arrangement with him. However, these matters are past, and there is little use in discussing them. But I must add, that to my mind, two things are as certain as that two and two make four. First, that James Colt was not entitled to a share under the will; and next, that the very share which the Court has given to him in the residuum belongs to your children. Fire will not burn out this opinion. I defy any person who is not afflicted with 'judicial blindness' to come to any other conclusion upon any natural rule of interpretation. But, after the first error was made, the second came as a matter of inevitable necessity. I don't think that any such change, in the trust as you allude to, could be brought about.

The estate will now be settled up speedily, and let me assure you it will be settled up without one single cent clinging to any finger that has dealt with it.

I shall always be happy to do anything in my power for the advantage of the interest represented by yr. family.

Yours truly,

R. D. HUBBARD."

We fully agree with Governor Hubbard in his views in regard to the adsurdity of the rule adopted in the case of James B. Colt It was still more absurd to undertake to apply that rule — even were it a correct one — to our own bequest, which stands upon a different footing.

But what we have stated and cited shows that the trustees, by their own action, and by operation of law, were, as such, in full possession, before the case of *Colt* vs. *Colt*, of all the property which the will, upon a proper construction, gives for our benefit; and that their views and meaning, at least up to that time, concurred in that idea.

The condition of affairs, at the time of the commencement of the suit of James B. Colt in June, 1864, is thus clearly placed before us.

Had that case never arisen, the trustees would have continued uninterruptedly to hold just in the manner they were then holding; and, finally, would have accounted to us for the whole stock.

While we have — in order simply to bring out definitely the actual state of facts in the case — taken the pains to show that the defendants referred to were trustees *in actual possession*, it will be borne in mind that it is not a matter upon which our claim or the result of this case depends. The fact that the will gave them the property and that it was feasible for them at any time to avail themselves of the gift, is sufficient.

They have been at all times the repository of that right, and are responsible to us therefor.

Their theory is that the judgment in the case of *Colt* vs. *Colt*, in some way, barred their claim as trustees to the residuary stock. But how could this be so, if the trustees were not parties and did not appear and act as such in that case?

If that judgment has not this effect, then it has no bearing on the present case, and the trustees are left in the same position they occupied before it was rendered, and would occupy, if it had never had any existence.

THE PROBATE PROCEEDINGS CANNOT BE SET UP AS A BAR IN THIS SUIT.

The gift of the property to the trustees and their acceptance, and the feasibility of their taking the possession, renders them liable without more. If they have, either by means of a mistaken distribution made by themselves as executors, or by any other means, allowed any part of the property to pass to others, it is far from constituting a defence. And this is all that the probate proceedings purport to show.

No Probate Jurisdiction over Trust Property.

Besides this, we have already shown that the defendants, Colt, Hubbard and Jarvis, were *trustees in possession* of the property which is the subject of this suit, long before any probate proceedings took place upon their accounts; the first of which was filed in June, 1866.

The action of the Probate Court thereon could therefore have no effect upon this property, all of which was in the hands of the trustees as such, and no longer in the hands of the executors as such; it was removed from the sphere of the jurisdiction of the Probate Court.

The property, being once vested and in the posses-

sion of our trustees, as such, could not be divested by any action of the Court of Probate. They must account to us for the trust property which came into their hands, and equity is the proper forum in which to enforce such accounting.

In fact, it is not claimed by the respondents that there were ever any accountings in the Probate Court by them made *as trustees;* and the Probate Courts in Connecticut have no jurisdiction over the settlement of the accounts of testamentary trustees.

In *Parsons* vs. *Lyman*, 5 Blatch. 170, 177, after reviewing the statutes of Connecticut, the Court says: "I conclude, therefore, that no jurisdiction is given to Courts of Probate over the settlement of the accounts of trustees of the character of the defendants." (The defendants in that case were testamentary trustees.)

In *Prindle* vs. *Holcomb*, 45 Conn. p. 111, the Court held that the annual account, rendered by a trustee and approved by the Court, does not conclude the parties, and that the Court of Probate has no power to settle the final account of a trustee and to determine conclusively the rights of the trustee and parties interested. After reviewing the statutes conferring jurisdiction on the Probate Court, the Court say (pp. 123–125): "As thus constructed, Courts of Probate were courts of special and limited powers, and had such jurisdiction only as was expressly conferred by statute" . . . . . "If equity jurisdiction was so sparingly conferred, and to a limited extent only, upon the higher courts, it affords strong reasons for presuming that Courts of Probate did not exercise such jurisdiction without express authority.

"These reasons seem to us sufficient to justify the

conclusion that the accounts required by the act of 1853 do not conclude the parties; and that there is little or no room for inferring that the Court of Probate has power to settle the final accounts, and to determine conclusively the rights of trustees, and the parties interested in the trust estate."

And the Court cite *Parsons* vs. *Lyman*, above referred to, as holding the same view.

See also Hayes *vs.* Hayes, 48 N. H. 219, 229.

But, as we have seen, the respondents did not undertake to account as trustees before the Court of Probate, in this case, so that the question of the powers of the Probate Court, in this particular, may be dismissed without further comment.

Our claim in fact never passed upon by the Probate Court.

The probate proceedings, set up by the respondents, consist of the accounts filed in the Court of Probate by them as *executors* under the will, which, it is claimed, were allowed and accepted; also of a certain distribution, made in said Court of Probate, of all the testate estate not *specifically* devised by said will.

The testator died in January, 1862; in June of the same year, an inventory was returned; in June, 1866, the executors filed their first account, in which they set off all the stock of the testator in Colt's Patent Fire-Arms Manufacturing Co. to different persons as having been specifically devised.

The distribution of the testate estate, *not specifically devised*, related therefore to other property, and did not include the stock in question. The executors rendered another account in 1870; and still another in 1873. The life interest in 574 26–31 shares awarded to James B. Colt terminated by his death in 1878, and that stock still remains in the hands of the respondents. It will be observed that no order of division or distribution as to the stock was ever applied for or made by the Court of Probate. The executors transferred the stock to themselves and various other parties, and afterwards filed their accounts stating such transfers accordingly. The probate proceedings set up by the respondents consist, therefore, of the action of the Court of Probate after the act of transfer had been performed.

Now, in the first place, the Court of Probate has not passed upon the question of our claim at all. No issue was anywhere made up upon it. The court were not asked to determine it. It could not be constituted *res adjudicata* by any determination contained in the proceedings had. Where can be found in those proceedings, as they are spread out in this hearing, any determination or decision of the question at issue here? The executors were credited with a certain amount of stock, which was transferred to us by them. They *had* transferred to us that stock. We were entitled to it, *and to more than that amount.* The executors were entitled to the credit, therefore, for what they had transferred to us, and it could not be disputed. *But there is no decision made that that constituted the whole of what belonged to us under the will.* The court were never asked to pass upon that question. Their action upon the entry of that credit did not touch the question of what we were entitled to, outside of and beyond that entry and that amount.

The most that can be contended for by the respondents, would be that the accounts of the executors contained credits in their favor for stock distributed by them to other parties, which, it might be said, such parties would not have been entitled to in the proportions stated, upon the theory that our claim is just and valid, thus denying our claim by implication. To begin with, such decision of the Court upon the claims of the *other parties* does not, as a matter of legal reasoning, imply or involve any such decision or adjudication upon our own claim, and thus constitute it *res adjudicata*. In what way does it do so? Apply a test. Suppose the executors held in their hands today (by the falling in of life interests or any other means, no matter what), stock and accumulations sufficient and more than sufficient to cover our full claim: could it be for a moment contended that anything exists in the probate accounts or proceedings set up here, which would cut us off from our right to recover therefrom what belongs to us under the will? If not, then the question of *our claim is not res adjudicata*. This exposes the fallacy of any such theory. For if it were *res adjudicata*, it could not be enforced or acted upon under any circumstances whatever.

And in fact, the respondents referred to, do hold in their hands at this time 574 26–31 shares of stock and certain accumulations thereon, as we have seen. How do any of the probate proceedings or accounts, referring only to certain property already distributed, and silent as to our claim, have any effect upon our rights as to this property still in their hands? The fact that they do not have any such effect shows that our claim exists, and is not *res adjudicata*. But if it is not *res adjudicata* as to that, it is not *res adjudicata* at all. It exists not only as to any stock still in their hands, but continues valid in its full force and extent, unlim-

ited and unaffected by anything which the Probate Court has done, or by any consideration of the amount remaining in the hands of the said respondents.

As far as the Probate Court is concerned, a simple statement of the case is this: The executors pay over the stock according to the supposed findings of the higher court, and file an account which shows a certain amount of stock received, and the same amount of stock paid over to different persons; and the Probate Court accepts this account, and, in accepting it, finds to be true all that the account or record discloses on this point, viz.: that certain stock has been received by the executors, and has been paid over by them to the persons and parties named in the account.

Allowance of payments to others is a distinct matter from our claim.

But perhaps it is unnecessary to resort to this reasoning and analysis to show that our claim is not cut off by any implication, growing out of the allowance of credits for payments to other parties.

They are separate and distinct matters from our claim, and cannot in any such way be confused and mixed up with it. The doctrine of *res adjudicata* recognizes no rule permitting that.

"No judgment or decree is evidence in relation to any matter which came collaterally in question, nor to any matter incidentally cognizable, or to be inferred from the judgment only by argument or construction."

Freeman on Judgments, Sec. 258 (2d Ed.), and cases cited.

Bigelow on Estoppel, 197 (2d Ed.).
Dutchess of Kingston's Case, Smith's Ld. Cases, Vol. II., * 573.
Lawrence *vs.* Hunt, 10 Wend. 80.
Jackson *vs.* Wood, 3 Wend. 27.
Wood *vs.* Jackson, 8 Wend. 9, 38.
Hopkins *vs.* Lee, 6 Wheat. 109.

In Dickinson *vs.* Hayes, 31 Conn. 423, the Court says: "But a judgment is co-extensive only with the issues upon which it is founded, and conclusive only upon the matters *necessarily* involved and included within that issue. . . . It is not evidence of any fact to be inferred from it by argument, as having constituted one of its grounds."

In that case, it was held that the Probate Court, in approving a will, did not *necessarily* find that the testatrix was twenty-one years of age, and so able to make a will disposing of real estate; and this though the will in question disposed of real estate, and such real estate had been distributed according to the will under the direction of the Court of Probate.

Nor as a matter of fact did the Court of Probate assume to pass upon the question of the amount belonging to us or any of the legatees under the will.

That matter was left to the Superior Court and Supreme Court of the State. A decision was rendered there upon the matter. The executors followed it in distributing stock to the various legatees, and filed an account stating the same in the Court of Probate. The latter court accepted the account so filed, but did not

attempt to pass upon the question of what the legatees were entitled to.

At the outset, therefore, it plainly appears that the question at issue in this case, *was not* considered and decided by the Probate Court.

The Probate Court had no Jurisdiction over Question at issue here.

But that court *could not* take cognizance of that question. It had no jurisdiction over it.

The Court of Probate is not a court of construction. It cannot entertain the question of the construction of the legacies in a will.

It is strictly a Court of *Probate*. The jurisdiction of the question of the amount of a legacy, and to whom it belongs, and when it is payable, belongs not to the Court of Probate, but to the courts of equity and of common law.

See Williams on Executors [294], 6th Am. Ed., 339, 340.

"It should further be observed that a court of equity considers an executor as the trustee for the legatees in respect to their legacies, and, in certain cases, as trustee for the next of kin of the undisposed of surplus; and as all trusts are the peculiar object of equitable cognizance, courts of equity will compel the executor to perform these, his testamentary trusts, with propriety. Hence, although in these courts, as well as in courts of law, the seal of the Court of Probate is conclusive evidence of the *factum* of a will, an equitable jurisdiction has arisen of construing the will,

in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of *construction* in contradistinction to the courts of *probate*."

"It should be observed that, as long as the ecclesiastical courts had the exclusive testamentary jurisdiction, they were also courts of construction as well as courts of probate; because suits for legacies might have been brought therein. Indeed, the cognizance of legacies in former times belonged exclusively to the ecclesiastical jurisdiction; for the court of chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees; but the new Court of Probate is not a court of construction, for, as it has already appeared, the 23d section of the act by which it was created expressly prohibits it from entertaining any such suit."

See also Hayes *vs.* Hayes, 48 N. H. 219.

In *Colt* vs. *Colt*, 22 Conn. p. 450–451, it is held that the jurisdiction over the questions referred to appertains to the courts of equity and common law, and the Court say: "The legacies were payable by force of the will itself, and it required no action of the Court of Probate to give the legatees a right to recover them." This leaves the Court of Probate absolutely nothing to do in connection with the decision of the questions referred to.

The language of the act conferring upon the Court of Probate of Connecticut the jurisdiction belonging to it, will be found in the appendix.

An examination of the statutes of Maine and Massachusetts conferring jurisdiction upon Probate Courts will show that they are in substance the same as the Connecticut statutes on this subject. A statement of these will also be found in the appendix.

It was held in *Cowdin* vs. *Perry*, 11 Pick. 511, that "The question to whom and at what time a legacy or distributive share under a will is to be paid by an executor is one of which the judge of probate has no jurisdiction. Any decree directing the executor to pay or not to pay a legacy to any particular person, or at what time a legacy should be paid, whether made upon or without notice, would be extra-judicial, and would afford the executor no justification. . . . Notice, therefore, in such case makes no difference, it cannot give jurisdiction."

In the case of *Williams* vs. *Cushing*, 34 Maine, 385, the Court holds the same doctrine:

"As this sum has been allowed the executor by the judge of probate, in the settlement of his account, it is insisted that this allowance is forever binding and conclusive upon all parties interested. The decree of the Judge of Probate, upon all matters within his jurisdiction, is final, unless vacated by appeal. As to matters without his jurisdiction, it is null and void. It is no part of his duty to settle the legal construction of a will, to determine, in case of different claimants, to whom payment should be made, or, when the amount is contested, what the sum should be. All these questions belong to another tribunal. The executor might await the legal decision of contested rights, or might, on his own responsibility, decide for himself. He chose the latter and must abide the result. These funds are to be deemed as still legally in his hands."

In *Parsons* vs. *Lyman*, 5 *Blatchford*, 170, the Court, referring to the jurisdiction of the probate courts of Connecticut, say (p. 174): "These courts in Connecticut have always been considered as possessing only a limited jurisdiction."

The statute above quoted, conferring jurisdiction upon the Probate Court, is recited in the decision, and the Court add: "This grant of jurisdiction, in its

general provisions, clearly gives to these courts control over all matters that properly pertain to probate tribunals. But it does not necessarily include all matters that relate to the disposition of property under the directions given in a will."

See also *Treat* vs. *Treat*, 35 Conn. 210: "The Probate Court has no power to decree a forfeiture under the conditions of a will."

See also Homer's Appeal, 35 Conn. 113, 114.

In this case, while the estate of Mary R. Mason was in process of settlement, Jarvis K. Mason, her husband, moved the Court to reject the distribution that had been made, and pass an order requiring the administrator to deliver the personal property to him. The Court of Probate assented to the husband's request, and ordered accordingly.

The Superior Court, on appeal, say: "It is manifest that the Court of Probate had no authority to pass the order appealed from. It was decided as long ago as *Gold's Case*, reported in *Kirby*, 100, that a Court of Probate ought not to reject an inventory of an estate, the title of a part of which is in dispute; for if any part of the estate is claimed by a third person, the parties have the right to try the title at common law. Much less in the case under consideration, could the Probate Court try and determine in this summary mode the title to property in dispute."

See also Davis *vs.* Weed, 44 Conn. 570, 576, 577.
Isaacs *vs.* Stephens, 13 Conn. 499, 505.

See also *Smith's Probate Law* (3d Ed., 140, 141). "The Probate Court has no jurisdiction of the questions to whom or at what time a legacy is to be paid.

The executor pays the legacies under the authority given him by the will of the deceased."

The jurisdiction of the Court of Probate, so far as it extends, is an *exclusive* jurisdiction.

Reese's Manual (Ga.), p. 24.

Smith's Probate Law (3d Ed., p. 5), in describing the jurisdiction of Courts of Probate, says, "This jurisdiction is *separate* and *exclusive*."

If the questions, therefore, of the amounts of the respective legacies; and to whom the stock belongs under that will, were cognizable in the Court of Probate, they were cognizable there solely and exclusively, and could not be considered and passed upon in any other tribunal.

But it was decided in *Colt* vs. *Colt*, that the courts of equity and common law had jurisdiction of these questions, in this very matter of the estate of Samuel Colt.

It is evident, therefore, that the jurisdiction over them was not in the Probate Court, for if it had been so, that court would have held it exclusively, and the other courts could not have interfered.

Again, the jurisdiction of the Probate Court over the whole matter, so far as it could extend, had already attached in that court before the time of the proceeding in *Colt* vs. *Colt* in the Superior Court. And the well established rule is, that where the jurisdiction of the different courts is concurrent, the one which is in first possession of it exercises it to the exclusion of the other courts. As the Court say, in stating the theory of the defence in *Parsons* vs. *Lyman*, above referred to, p.

172: "If the controversy is pending in the Court of Probate, the jurisdiction of this court equally fails from the well-known rule that where the jurisdiction of courts is concurrent over a subject matter, that tribunal which is first in possession of it exercises its jurisdiction to the exclusion of all others."

That the Court of Probate had *not even a concurrent jurisdiction* over these questions, is plainly shown by the operation of this rule, as well as by that of the rule before cited, that the jurisdiction of that court, so far as it extends, is separate and exclusive.

Further than this, the statutes of the State of Connecticut regard the jurisdiction over these matters as being reposed in the courts of equity. We find it provided in the General Statutes of Connecticut (Rev. of 1875, p. 447), as follows:

"Sec. 17. In any suit brought to a court of equity by the executor of a will, alleging that doubts have arisen as to its meaning, and asking for advice as to its proper construction, or directions as to his duties respecting the estate disposed of by such will, there shall be allowed to each of the parties to such proceeding such reasonable sum for expenses and counsel fees, as said court, in its discretion, shall deem proper; which allowance shall be taxed as costs in said cause, to be paid out of said estate."

How, in view of this, can it be contended for a moment that the jurisdiction of the Probate Court, which in its nature is *separate and exclusive*, extends over the questions of the construction of the will and the disposition of the property donated by the express provisions of the legacies therein contained?

Suppose a will gave to a legatee a certain definite legacy, say of the sum of ten thousand dollars, and the Court of Probate were to decide that the legatee is not entitled to the legacy; would that decision have

any binding effect? Would it interpose the slightest obstacle to an action for the recovery of it in the courts of equity or of common law, whichever under the circumstances of the particular case might have jurisdiction of it?

Suppose a will by its provisions gave property to various legatees, and among them gave to A a legacy of a certain amount of stock — say five hundred shares in one bank and five hundred shares in another bank — and the Court of Probate were to decide that the legatees were not entitled to the last-named 500 shares; would that decision have any effect, or in any way impede a recovery thereof in a suit against the executor?

Suppose the Court of Probate, in such a case, were to decide that the other legatees named in the will were entitled to have the last named 500 shares divided among them, to the exclusion of A, to whom they were really given by the will; could it be said that that decision would be binding and effectual, and would prevent A from recovering the stock in a proper suit at law or in equity? If not, then it is clear that the Court of Probate has no jurisdiction to make a valid decision of that kind. Yet, what more is it contended here that the Hartford Court of Probate did — or, to state it more accurately, would have done if they had been applied to, to make, and had made an order of distribution, disposing of the Colt stock in the manner in which the executors disposed of it? Can it be said that, this being done, an order of the court allowing the accounts (passed on a notice of from four to seven days after it was filed) in any way operates to conclude the legatees from proceeding in this Court to recover their legacy; and especially where no personal service upon the parties inter-

ested is required, and when it is considered sufficient to make one or two publications in a single newspaper of the brief notice, no matter at what distance parties interested may be? And yet, as Judge Shaw says in *Cowdin* vs. *Perry*, above referred to, if such accountings were a bar, it would be "necessary for all legatees, even those whose legacies are payable at a future day, to attend upon such notice to see that their legacies are not paid over to other persons."

The nature of the notice itself shows that no such grave consequences were had in view.

The order of distribution, it will be observed, passed in the case of this very estate, was an order to distribute only such testate estate as was not *specifically* bequeathed by the will. The stock, being specifically bequeathed, was not included in the order of distribution, and was not divided by the distributors, but by the executors themselves. (*See deft's answer, Record, p. 77*). But however, and by whomsoever the division is made, it must, in order to be binding, be *according to the will*. In other words, it must be *the division directed by the will*, and none other. If there is any question as to the construction of the provisions of the instrument, which render it doubtful *who is entitled to the* legacy under its terms, that question of construction must be decided by a court of competent jurisdiction, and the Connecticut Statutes point out the method. In a proceeding for that purpose, all persons, whether in their individual capacity, or as trustees or *cestuis*, who represent the various interests under the instrument, must be made parties. If this is done, all will be bound by the decision, if the proceeding is in other respects regular. The failure to do this, however, involves the result that any who are not so made parties, whether

in their individual capacity or as trustees or otherwise, would not be bound by it.

As the Probate Court could not in the first instance exercise jurisdiction over the question of the title to this legacy, by passing an order to that effect; so it could not do it indirectly, after the alleged division had been made, by way of allowing and settling the executor's accounts. It had no more power to pass upon the question, by way of ratification, than it had to entertain an application for an order to settle the question of title in the first instance.

The Court of Probate and the executors have no right, or power, other than to administer the estate *according* to the *provisions of the will.* This is the charter by which they must be strictly guided. If the provisions are doubtful, and require a construction to be placed upon them by a competent tribunal before they can be safely administered, the Court of Probate is not the place to apply for such a construction. Its decision thereon affords, therefore, no protection to the executor in the matter; and if he acts without applying to a tribunal legally competent to give the construction required, he does so upon his own responsibility.

To say that the Court of Probate of Hartford had power and jurisdiction to pass upon the questions of the amounts of these legacies, and to whom they were payable, in the course of the settlement of the executors' accounts, is to say that they might have reversed the decision upon the matter in the case of *Colt* vs. *Colt.* And if the theory of our opponents is correct, there might have been two decisions upon the matter adverse to each other, each rendered by a court legally competent to act in the premises — the court of equity having decided one way, and the Court of

Probate possessing the power, as incident to its function of passing upon the executor's accounts, of deciding another way.

The question under consideration arose and was fully discussed in the case (above cited) of

Cowdin *vs.* Perry *et al.*, Executors,
11 Pick. 503, 511, 512.

This was a suit for a legacy, and the parties agreed to the following facts: that the defendants were executors under the will of Asa Perry; that between July 3d, 1827, and December, 1830, the executors had converted most of the property into cash, and paid over various sums to the various residuary legatees, among whom the plaintiff was one. In December, 1830, the executors, after giving due notice to all persons interested, settled their final accounts in the probate court, which contained the various charges for moneys paid to the residuary legatees. "*The plaintiff was present and attended to the settlement of these accounts.*" In March, 1830, James Carter, one of the residuary legatees, died under age. The executors had paid over to his guardian, before his death, a proportional share of the residuary estate; and this payment appeared and was allowed in the executors' accounts, at the settlement above mentioned, when the plaintiff was present. The plaintiff claims in this suit that, under the proper construction of the will, the legatee, who died before his majority, was not entitled to the legacy which the executors had paid to his guardian; and he now sues for his proportional share of the legacy so paid over to the guardian of the deceased legatee.

The executors set up two defences:

First. That the legacy was rightfully paid according to a proper construction of the will.

Second. That however this might be, the plaintiff was estopped from maintaining this action by reason of the decrees of the Probate Court, in that the subject matter was within the jurisdiction of the Court of Probate, that the plaintiff had due notice, and was present at the settlement of the accounts, and made no objection, and that *no appeal* had been claimed from the decree by which these accounts were allowed.

SHAW, C. J., in giving the opinion of the Court (p. 511, 512), says:

"Another objection made by the defendants to the plaintiff's recovery, is that the plaintiff is estopped by the decree of the judge of probate on the settlement of the probate accounts of the executors, in which payments made to Calvin Carter, as the guardian of James Carter, were charged and allowed, of which settlement all persons interested had notice; and they rely on the following cases: *Dublin* vs. *Chadbourn*, 16 Mass. R. 433; *Homer* vs. *Fish*, 1 Pick. 435; *Laughton* vs. *Atkins*, 1 Pick. 535; *Rice* vs. *Smith*, 14 Mass. R. 431.

"All these were cases where the subject matter was obviously within the jurisdiction of the courts deciding them. The first and third were questions on the probate of wills; a subject not only clearly within the jurisdiction of a Court of Probate, but one of which in this state it is held, that that court has peculiar and exclusive jurisdiction. The last case, above cited, was also within the jurisdiction of the Probate Court to accept and confirm a partition among heirs; but the decree was not binding and conclusive on those who had no notice.

"But the question *to whom* and *at what time* a legacy or distributive share under a will is to be paid by an

executor, is one of which the judge of probate has no jurisdiction. Any decree, directing the executor to pay or not to pay a legacy to any particular person, or at what time a legacy should be paid, whether made upon or without notice, would be extra-judicial, and would afford the executor no justification. It is difficult to conceive how a subsequent ratification or allowance of a payment already made can be of any greater force or effect. It would, in this respect, be similar to a decree directing payment of a debt when the estate is solvent, and as such a mere nullity. *Dawes* vs. *Head*, 3 *Pick.* 142.

"Notice, therefore, in such case, makes no difference; it cannot give jurisdiction. The notice was to all persons to appear, to attend to the settlement of the executor's probate accounts. The construction contended for on the other side would render it necessary for all legatees, even those whose legacies are payable at a future day, to attend upon such notice to see that their legacies are not paid to other persons.

"The object of such accounting by the executor before the judge, is to show that he has paid according to his charges, and upon producing proof of the fact of payment, such charge is allowed. But whether such payment is rightful, is a question for which the executor himself stands responsible. To hold that an allowance of a payment in account, under such circumstances, would bar a legatee whose legacy is not yet payable, would be pressing the doctrine of *res adjudicata* beyond all reasonable limits.

"As to a waiver of his claim, on the part of the plaintiff, we think there are not facts enough to support it. . . . . Here the only fact stated is, that the plaintiff was present at the Probate Court when these accounts were allowed. This,

undoubtedly, was quite sufficient to conclude him as to all judicial acts, done within the scope of the jurisdiction of the court. But it does not appear that the plaintiff saw the accounts, or knew any of the facts, or by any act or declaration assented to them; nor is there any ground to believe that he knew of his legal rights, and assented to waive them. Independently therefore of its efficacy as a judicial proceeding, there is nothing in the decree of the Probate Court allowing the settlement of the executors' accounts, or any act of the plaintiff in relation to it, upon which to found the conclusion that he has waived any legal right against the executors."

See also Williams *vs.* Cushing, 34 Maine, 370–375.

In this case an executor, believing it to be according to the provisions of the will, paid over to a legatee a sum of money which he should have held in trust, and as this payment had been allowed the executor by a judge of probate in the settlement of his account, it was insisted that this was binding and conclusive upon all parties interested, unless vacated by appeal.

The language of the Court is as follows: "As this sum has been allowed the executor by the judge of probate in the settlement of his account, it is insisted that this allowance is forever binding and conclusive upon all parties interested. The decree of the judge of probate, upon all matters within his jurisdiction, is final unless vacated by appeal. As to matters without his jurisdiction, it is null and void. It is no part of his duty to settle the legal construction of a will, to determine, in case of different plaintiffs, to whom payment should be made, or, when the amount is contested, what the sum shall be. All these questions

belong to another tribunal. The executor might await the legal decision of contested rights, or he might on his own responsibility decide for himself. He chose the latter, and must abide the result. These funds are to be deemed as still in his hands, the payment to the town of Augusta having been made without authority."

See also Arnold *et al. vs.* Smith (decided by the R. I. Supreme Court, July 7, 1883, reported in R. I. Index S., p. 63.)

In deciding this case, which is an appeal from the Municipal Court of the city of Providence, exercising probate jurisdiction, in which the propriety of charges for the payment of certain legacies in the account of an administrator, *cum testamento annexo*, was called in question, DURFEE, C. J., says:

"We think it is not any part of the duty of courts of probate in this state to superintend the execution of wills and determine whether legacies are duly paid or not, and that, therefore, the charges should be stricken out of the account. The settlement of an administration account involves simply the adjudication of charges against the estate arising from the payment of liabilities incurred by the decedent in his lifetime, or of allowances to the widow, etc., under the statute, or of funeral expenses and the expenses of administration. The settlement so made when completed will show the surplus of assets, if any, which remained for division to the distributees under the order of distribution if the estate is intestate, or for division under the will if the estate is testate. It is the duty of the court, if the estate is intestate, to make the order of distribution; but, if the estate is testate, the court has no further duty, after the surplus has been definitely ascertained, and it ought to leave the executor or admin-

istrator to account for the surplus under the will and according to law, to be enforced by other tribunals. The practice of allowing for legacies paid in the account is, to say the least, irregular, and ought to be discontinued. Questions in regard to legacies depend on the construction of the wills which bequeath them, and are sometimes difficult to decide, and, whether difficult or easy, the Courts of Probate should not undertake to decide them."

See also Smith *vs.* Lambert, 30 Maine, 137, 145.
Granger *et al. vs.* Bassett et al., 98 Mass. 462, 499.
Williams on Executors (2062), note i, 6th Am. Ed., p. 2171–2.
Hayes *vs.* Hayes, 48 N. H. 219.
Treat *vs.* Treat, 35 Conn. 210.
Parsons *vs.* Lyman, 5 Blatchf. 170, 174.

Also Hanson *et al. vs.* Worthington *et al.*, 12 Md. 419 (already cited).

In this case, the sum of ten thousand dollars, bequeathed for the benefit of the *cestuis que trust*, had been divided up among the legatees under the will generally, and the executors had rendered their accounts to the Orphans' Court (exercising probate jurisdiction), and the accounts had been allowed and settled. And the decrees of that court were attempted to be set up as a bar to the plaintiff's claim. But the court held the defendants liable notwithstanding, and that they were bound to collect the amount for the purposes of the trust.

And it is to be remarked that even if the probate proceedings could have possibly been held in any manner to protect the *executors*, they would, on the other hand, in no way protect the *trustees;* nor

would they protect the other legatees from accounting to us, under their liability, as heretofore explained.

But by statute provisions in Connecticut, the Probate Court has no jurisdiction in certain cases to pass upon the division of testate property, and in no case, to make or sanction any other than the very division directed by the will, and among the very legatees to whom the legacy is given by the will.

We have shown the want of jurisdiction in the Probate Court to decide to whom a legacy belongs. On the other hand, all the power and jurisdiction which that court has, in the matter of the division of property bequeathed to be divided among several legatees, is that which is given to it by statute; and an examination of the limit and extent of the jurisdiction there given, clearly demonstrates the correctness of our position.

The jurisdiction of this Court is derived entirely from statute. Hosmer, C. J., says, in *Pinney* vs. *Bissell*, 7 Conn. 24: "It is indisputable that the jurisdiction of the Probate Courts in this state is limited and conferred by statute alone. These courts have no common law jurisdiction."

Where is the statute provision to be found authorizing the administration of a testator's estate in any other way than *according to the provisions of the will*; or, in other words, authorizing the disposition of any portion of it to other parties, or in any other amounts, or in any other way, *than as directed by the will?*

The entries contained in the executors' accounts upon the subject of the disposition of this stock constitute merely a STATEMENT OR REPORT *of a division of the stock which they had made*. They are not to be regarded as on the same footing with entries of charges for expenses or debts paid by the executors. The executors held certain specifically bequeathed property, which stood to their charge; they make a certain division of it, rightly or wrongly, and return a statement thereof to the Court, by these entries in their accounts. This portion of their accounts is simply a representation or report of what they had done with that property.

The will gave it to and directed its division among certain legatees, including the trustees, for our benefit. The executors report that they had divided it among *the other* legatees, excluding our trustees. The question is, whether they had the authority to make this disposition, against the provisions of the will, or whether the Probate Court possessed any jurisdiction to validate it by a subsequent sanction.

The jurisdiction of the Probate Court over the matter of the division of testate property directed by the will to be divided among several legatees, is stated in the General Statutes of Connecticut (Rev. of 1866), at page 414 (Sec. 62), as follows:

"Whenever a testator shall order any real or personal estate to be divided among two or more devisees or legatees, without appointing any person to make the same, or if he shall appoint some person to make it, and the person appointed shall refuse to make it, or die, or become incapable of making it, the Court of Probate having jurisdiction of the estate shall appoint three disinterested and judicious persons to make the division, and to make return of their doings to said court."

The will of Colonel Colt specifically directs that this residue of stock "shall be divided" among certain legatees.

Either this legacy of stock was one which required the Court of Probate to pass an order appointing commissioners to make the division of it, or it was not.

If it was, then no division which would be valid could be made, except by the appointment of such commissioners according to the statute, and their action, and a return thereof to the court.

Baldwin's Conn. Dig., p. 254, par. 133.
Phillips *vs.* Swan, Kirby, 429.
Davenport *vs.* Richards, 16 Conn. 317.

These cases show that under the act providing similarly for the distribution of intestate property by means of three distributors to be appointed by the Probate Court, such an order is requisite to the legal distribution of the estate.

In the last case the Court held that an order of distribution was appropriate to be made, even where the property to be divided consisted of money in the hands of the administrator, as in the case of other property; and "without it, the records of the Court of Probate would not show a legal settlement of the estate, in the one case, more than in the other."

What was the nature of this legacy of stock in the respect referred to? It certainly directed the division of certain property among several legatees, and therefore, so far as probate action was concerned, came within the terms of the statute requiring the appointment of commissioners, unless the will appointed some one to divide it. The division stated in the accounts *was* made by the executors. Were they, then,

by the will constituted the persons to make it? If this was the case, it was then not a matter for the consideration or action of the Probate Court either before or after the fact, the latter possessing no jurisdiction whatever over it. See *Strong* vs. *Strong*, 8 Conn. 409, where the will authorized the executors to divide the estate, and in which case the Court say:

"This statute certainly gives Courts of Probate no authority to interfere with the doings of distributors appointed by testators, except in certain specified cases, of which this is not one; and such courts have no common law jurisdiction.

"Real estate in given by will, and is ordered by the testator to be divided. Two persons are appointed to divide the same. They are both alive, and have not neglected or refused to make the division. Whether they have done right or wrong, or whether the division be according to the will or not, are not questions of probate cognizance, and therefore not within the appellate jurisdiction of the Superior Court. If the distributors have done their duty, the distribution is made according to the will; if not, *it remains to be done*. The decree of the Court of Probate has not affected the validity of the distribution, if any it had. All the proceedings in that court are *coram non judice*."

The statute classes real and personal property in this respect upon the same footing, and both, therefore, come under the same rule. The Court of Probate is not to act when the will constitutes the distributors.

If, therefore, the will authorized the executors to make the division of the stock, there was then no probate jurisdiction in the matter at all; and since the division made was not that *directed by the will*, not

being made to and among the same and all the legatees to whom the stock is given, it had no possible validity; and the entries representing it in the executors' accounts are of no effect in this case.

If, on the other hand, the executors were *not* by the terms of the will appointed to divide the legacy, then no person was so appointed by that instrument.

In that case, no division valid and binding upon the parties could be made, except in the manner required by the statute, by passing an order appointing commissioners for the purpose.

No such order was passed, and, therefore, if the legacy was one requiring action on the part of the Probate Court in dividing or distributing it, no valid distribution was made. But a glance at the nature of the order which must have been passed by the court, if such action had been taken, shows at once that it had no more authority or jurisdiction to make, in any mode of proceeding, such a division as that reported in the accounts, than the executors themselves had.

In the event of making such an order, all the authority possessed by the commissioners would of course be that derived from the direction of the court, and all the jurisdiction and authority of the court in making such direction, would be that derived from the statute; and an express grant of jurisdiction, in the matter referred to by statute, excludes of course any power not therein conferred. What division then, at the most, could that court direct under the jurisdiction conferred by the statute? The latter provides that, "Whenever a testator shall order any real or personal estate to be divided among two or more devisees or legatees, without appointing any person to make ***the same***, or if he shall appoint some person to make ***it***, and the person

appointed shall refuse to make ***it***, the Court of Probate having jurisdiction of the estate shall appoint three disinterested and judicious persons to make ***the*** division."

There can be no pretence that this language confers authority upon the court to make any other division than the very one — "the *same*," directed by the will. To this, the jurisdiction of the court in the premises is limited.

They cannot decide the question of *title* to the legacy, but can simple *divide* it among the legatees to whom it is actually given. If, for any reason, the terms of the will are doubtful in their meaning, and a construction thereof is required to determine the question as to who are the persons entitled to the legacy, it must first be sought in a tribunal competent for that purpose, and in a proceeding to which all those interested are made parties. And if, in such a case, the Probate Court proceeds without such preliminary construction, the validity of its act will depend upon whether it has recognized the rights of all those actually entitled, as they may be finally determined.

Should it order a decision other or different, in any respect, from that directed by the will, such order would be an act out of and beyond the jurisdiction of the court.

If the will directs a division among a certain number of legatees, the court has no power to order a division among a greater number, nor to omit any part of the legatees and order a division among a less number. This is too plain for argument.

Now, in this state of the case, what is the effect if the executors without such an order proceed and make a division different from that provided by the will — by omitting one or more of the legatees — and pre-

sent a statement thereof to the court? Can it for a moment be pretended that what the court could not do by a regular method, it could by its subsequent sanction validate in an irregular method?

There is, in the nature of things, but one other conceivable theory, with reference to the view taken by the executors and the Probate Court in regard to he distrib ution of this legacy and the method adopted, and this is, that although the legacy was one directing the division of property and appointing no one to make it, and therefore, if the Probate Court were to act upon it, it must be in the mode required by the statute above pointed out, yet it was held that the title of the several legatees and their respective proportions had been finally adjudicated and settled in the case of *Colt* vs. *Colt*, and that, therefore, no action of the court of probate was called for.

As a matter of fact, was not this really the ground taken? But if the Probate Court acted at all, it could only proceed accordiing to the method required by the statute. They took no such action. They could not, by adopting any other mode of proceeding, exercise a larger jurisdiction than that conferred upon them in carrying out the method pointed out by the law. It follows, therefore, that nothing binding or conclusive in the matter was done by the Probate Court — the executors being left to divide the stock under the judgment in the case of *Colt* vs. *Colt*. In determining as to the validity of the distribution of this stock by the executors, we are thus remanded, after all, to the question, whether the judgment rendered in the case of *Colt* vs. *Colt*, between those who were made parties thereto, and conducted in the mode already described, is binding upon our trustees and ourselves, and can be set up as an estoppel or bar in the present action.

If it is not — as we think we have shown — and if the division directed by that judgment and made by the executors is found to be different from that provided by the will, it could gain no validity from the sanction of a Court of Probate, which had itself no jurisdiction to make any other division than the very one directed by the will.

The Notice given in the Probate Proceedings.

The other points seem so decisive of the question in regard to the probate proceedings, that we will but briefly consider this matter of notice.

But the orders passed by the Probate Court were not made upon a sufficient and legal notice to the parties.

The statute of Connecticut provides that notice shall be given of the allowance of an executor's account by publication or otherwise, *as the court may deem proper*, to all persons interested therein. Whatever may be the law with respect to the conclusiveness of a service by publication, all the courts agree that such service, to be binding, must be *strictly* complied with.

The order of the Probate Court for the allowance of the first executors' account, in 1866, in which the stock was all set off, directed that the executors give notice by publishing the order in a "*weekly* newspaper published in Hartford," and the decree of the court so finds. As a matter of fact, the notice was never published in a weekly newspaper published in Hartford, but was published in the "Hartford *Daily* Courant" for June 11th, 12th and 13th, 1866. The

order of the Court not being complied with, there was no legal notice.

(Record, pp. 211, 139.)

Moreover, the notice which was published was not the notice which was ordered by the Court. The order published was not the order which appears on the records of the Court, and which the Court ordered to be published as notice, but varies in essential particulars. The recorded order of the Court is as follows:

(Ex. 15, Record, p. 139.)

"*Ordered*, That the 15th day of June, 1866, at 10 o'clock, A. M., be and the same is assigned for the exhibition and allowance of the executors' account with said estate; and this Court directs the executors to give public notice to all persons interested therein *to appear and be heard thereon*, by publishing *this order* in a *weekly* newspaper published in Hartford, and posting a copy on the public sign-post in the town where the deceased last dwelt, and return make to this Court.

Attest, LUCIUS TUTTLE, *Clerk*."

The notice actually published, in a *daily* newspaper, and not in a *weekly*, as ordered by the Court, is as follows:

(Ex. M, Record, p. 211.)

"At a Court of Probate holden at Hartford, within and for the district of Hartford, on the 8th day of June, A. D. 1866. — Present, James Nichols, Esq., Judge.

"On motion of Elizabeth H. Colt, Richard D. Hubbard, and Richard W. H. Jarvis, Executors of the last will and testament of Samuel Colt, late of Hart-

ford,' within said district, deceased. It is ordered by this Court that notice shall be given that the Administration Account in said estate will be exhibited for settlement at the Probate Office in said district, on the 15th day of June, 1866, at 10 o'clock, A. M., by posting a copy of this order on the public sign-post in said town of Hartford, and by advertising the same in a newspaper published in Hartford.

Certified from Record,
LUCIUS TUTTLE, *Clerk.*"

The notice published is not *the* notice ordered by the Court. The order of the Court, as published, varies *throughout*, both in form and in substance, from the actual order of the Court, as recorded. The very important portion of the actual order, by which the executors are directed "to give public notice to all persons interested therein to appear and be heard thereon," is entirely omitted from the order as published.

In the case of the other accounts, the same defects appear in the notice; so that, in any case, the executors have failed to give the notice ordered by the court, and so must be considered as having given *no* notice at all. The finding of the court with regard to the notice do not alter the case, as by statute such finding is only *prima facie* evidence of the fact.

See Gen. Stat., Conn. (Rev. of 1866),
Title 20, Chap. VI., Sec. 142, p. 439.

The order for the exhibition and allowance of the second account was obtained Aug. 1, 1870, and the time assigned for its exhibition and allowance was Aug. 5, 1870, a period of *four days*. The order for the third account was obtained Jan. 6, 1873,

and the time assigned for the exhibition and allowance of the account was Jan. 10, 1873, also a period of *four days*.

(Record, p. 153.)

Owing to the shortness of time, it was simply impossible that this published notice could have reached the complainants.

As to the first account in 1866, the Probate Court finds that Henry C. Robinson appears for Isabella DeWolf Colt, Edward D. Colt, LeBaron Colt, and Samuel P. Colt; but it does not appear that any *guardian ad litem* was appointed for the infant complainants, that there was any appearance of the general guardian by attorney or otherwise, or that the trustees of the complainants appeared by attorney or otherwise.

And right here, to support the position contended for by the respondents, it must be held that this appearance (admitting such to be fact) by attorney, of these infant complainants merely at the allowance of this account and in the absence of any *guardian ad litem*, or general guardian, and of their trustees, forever concluded them and their trustees from setting up any claim under the will to stock which belonged to their trustees and to which they themselves had no legal claim until January, 1873.

As to the supplemental account of August, 1870, the Probate Court finds certain persons were *personally* notified, enumerating them, and finding them to be "*all the parties in interest in said estate.*" Here, as before, the trustees are not mentioned as parties in interest, nor found to have been notified or present, nor is any mention made of any *guardian ad litem.*

In the account of January, 1873, there is no enumer-

ation by name of those who appeared or were interested in the estate, but only a general finding by the Court.

The courts of equity of the United States cannot be ousted of their jurisdiction by any state laws in regard to the jurisdiction of Probate Courts.

Suydam *vs.* Broadwax, 14 Peters, 67.
Union Bank *vs.* Joley, 18 How. 507.
Payne *vs.* Cook, 7 Wallace, 425.

THE RECEIPTS SET UP AND ALLEGED IN THE ANSWER DO NOT RELIEVE THE DEFENDANTS FROM THEIR LIABILITY.

There is nothing in the receipts set up by the defendants (Record, pp. 137–140), or in their legal effect, which is sufficient to relieve these defendants of their liability to us upon any rightful claim accruing to us under the will.

In what sense are the receipts set up against us by the defendants?

If the executors and trustees have performed their duty and have turned over to us all that we are entitled to under the will, then that fact of itself protects them, and they need no such documents to secure their exoneration from further claim.

Are they then offered and set up to show the amounts paid and transferred to us, in order to enable the Court to see that those amounts are the same as those to which we are entitled under the will? If so, then so far as they indicate such amounts, they are binding upon us to prove that we have received them, and are good evidence to show how far equity has been done.

If they are offered for any further or greater purpose than this, then they are set up with a view of cutting us off from the recovery of some other amount, to which the Court might consider us entitled under

the terms of the will, and against our claim to which, it is thought that these receipts or releases may shield the defendants. In other words, they are sought to be used by the defendants to protect themselves in respect to their failure to do equity by not having accounted to us for all which the will gives us, and in which respect, they are acting in violation and in breach of their trust, until they do account to us therefor.

An examination of the receipts will show that they do not, by their terms, purport to discharge the defendants from any such claims, and cannot, upon the face of them, be held to have any such effect.

The first receipt (Record, p. 137) is one given to the defendants referred to, purely as trustees. It reads as follows:

"Received of Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, trustees under the will of the late Samuel Colt, my proportional share of five hundred shares of the capital stock of the Colt's Patent Fire-Arms Co., bequeathed in said will to said trustees in trust for the children, except the oldest, of Christopher Colt, and of the accumulations thereof, viz.:

Shares,	-	-	-	125
Cash,	-	-	-	$31,759.01

"In consideration whereof, I hereby release, discharge and acquit the said Colt, Hubbard and Jarvis, trustees as aforesaid, from any and all further accountings, actions or causes of action for and on account of said trust.

JANUARY 11, 1873."

It does not purport to be a receipt for all of the

stock belonging to us under the will, but only for each signer's "proportional share of *five hundred shares* of the capital stock of the Colt's Patent Fire-Arms Company, bequeathed in said will in trust for the children, etc., and of the accumulations thereof."

Here, then, is a receipt not in any sense for *all* our stock, but for 500 shares of it; and the receipt refers only to the trust of that amount, and leaves untouched all question whether we are entitled to any more stock or not.

Then follow the words which are claimed to operate as a release, viz.:

"In consideration whereof I hereby release, discharge and acquit the said Colt, Hubbard and Jarvis, trustees as aforesaid, from any and all further accountings, actions or causes of action, for and on account of said trust."

What trust? Only one is referred to — the trust of the five hundred shares and accumulations which were turned over. The receipts and releasing words cannot, according to well settled rules of interpretation, be construed as extending to anything else, and in fact, contain no language which, logically or grammatically considered, refers in the slightest degree, to anything else; *nor is there the slightest consideration* for such a release — nothing being given to the signers therefor, to which they were not entitled irrespective of the paper signed.

Cumber *vs.* Wayne, I Smith's Leading Cases, *146, and notes.

This seems to demonstrate sufficiently that no question, affecting our claim or our right to enforce it here, arises under the terms of this receipt to the *trustees*.

The authorities hereafter cited, however, confirm this position.

Let us next consider the receipt given to the *executors*, the terms of which are as follows, viz.:

"Received, Hartford, January 11th, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of $2,975.24, being our full proportional interest and share in the balance of said estate in the hands of said executors, as per their final administration account, this day rendered and accepted in the Court of Probate; and having previously received in full the various other sums, legacies, annuities, devises and distributions, coming to us under said will and previous settlements and administrations, to our entire satisfaction, we hereby, in consideration thereof, release, discharge and acquit the said Colt, Hubbard, and Jarvis, executors as aforesaid, from any and all further accountings, actions and causes of action, excepting, however, the question of our interest in the remainder of the 574 26–31 shares of the capital stock of the Colt's Patent Fire-Arms Mfg. Co., bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined."

(Record, p. 138, 139.)

In the first place, this is a receipt to the *executors* merely as such. It is not a receipt to the *trustees*, and does not affect them, or relieve them from any liability whatever. And the proportion of the residuary stock given for our benefit was not then held by the *executors* as such. It passed into the hands of our trustees long before that time.

But had it been otherwise, it is plain that the receipt had nothing to do with, or any effect upon, the

claim of our *trustees* upon the estate for the proportion of the residuary stock given to them by the will.

And, therefore, this receipt cannot in any way operate to discharge the defendants from accounting to us for the property or rights which had come into their hands as trustees. The receipt does not reach them in that capacity.

A receipt discharging an *executor* cannot operate to discharge him from liability as *trustee* under the will.

Hanson *vs.* Worthington, 12 Md. 420.
(Before cited.)

Nor can it be held to discharge our trustees from their duty and obligation to enforce their claim as such for our benefit to the residuary stock bequeathed them by the will, for the reason already given.

Nor can it be held to discharge the executors from the claim of our *trustees* to the stock. Nor does it *purport* to release them from any claim of the trustees or for any trust property.

The fact is, this receipt was one given to the executors for and on account of legacies given in the will *directly* to the complainants, and exclusive of property placed in trust by the will.

This purpose is also indicated by the circumstance that the defendants took, at the same time or date, two separate receipts — one of them referring to, and purporting to be on account of trust property exclusively — and the other referring to, and purporting to be on account of direct legacies exclusively.

How, then, can this receipt be held in any way or manner to affect our claim in this case?

But let us proceed a little further, and see how far the receipt is available even, to the executors as such, and within the limits of the plain purpose for which it was given.

What does the receipt recite as the thing or amount paid over and for which it was given?

"The sum of $2,975.24, being our full proportional interest and share in the balance of said estate in the hands of said executors, *as per their final administration account, this day rendered* and accepted in the Court of Probate."

What was received at that time, therefore, was a certain sum of money, which is recited as being not the amount to which we were entitled in full, but the amount of our proportion of a certain sum, represented as the balance in the hands of the executors, in and by a certain account which had been rendered by them to the Probate Court. The words quoted neither admit nor determine whether that was the full amount coming to us.

A certain sum it seems had been represented by the executors as the balance in their hands. We receipt for our proportional share of that specific sum. Whether that representation made by the executors was correct or not, is another thing. We receipt merely for our share of the sum stated as the balance in their account. The question of whether that account is binding upon us, is discussed in its appropriate place in another portion of our brief. The question of whether it was correct in its statements, is to be determined in view of the construction which the Court shall place upon the will. Meanwhile, we have acknowledged the receipt merely of our proportion of a sum, represented by certain figures in that

account, saying specifically that it is our proportion of that sum so represented, and not saying that it was our proportion of the amount rightfully coming to us from the estate.

The receipt then goes on to acknowledge that the signers had "previously received in full the various other sums, legacies, annuities, devises and distributions coming to us under said will and previous settlements and administrations." What do these expressions mean, when taken together? It is not a receipt for the whole amount coming to them under the will, but for the amounts so coming to them, which had entered into "previous settlements and administrations." These last are words qualifying and limiting the preceding expression. Otherwise they have no sense or meaning, as the words, "the various other sums, legacies, etc., coming to us under said will," would comprehend everything, if they were not followed by the words above referred to. The amount acknowledged to be received is, therefore, plainly intended to be limited to what was coming to them under the will, so far as it had been represented and set forth in previous settlements and administrations, and cannot be held to extend farther than that.

What were the other "sums," etc., *coming to them under the will*, and which they say they had received? Were they any other than the sums, etc., represented and paid over to them in "previous settlements and administrations?" If so, then the receipt, by reciting the "sums, etc., coming to us under said will and previous settlements," etc., was made to extend to and cover amounts *which they had not received at all;* since the accounts show that they had only received what had been represented and set forth in the "previous settlements and administrations." Such a construction can hardly be put upon the instrument in a

court of equity. Plainly, what it referred to was the sums, etc., coming to them under the will as it was connected with and entered into and formed part of the matter of previous settlements and administrations. Then follow the releasing words to the effect that: "We hereby, in consideration thereof release, discharge, and acquit, the said Colt, Hubbard, and Jarvis, executors as aforesaid, from any and all further accountings, actions, and causes of action, excepting however the question of our interest in the remainder of the 574 26-31 shares, etc."

This language must be held to apply to the preceding expressions which we have above considered, and must be taken strictly in connection therewith.

This interpretation is called for by the maxim, "*noscitur a sociis*," as well as by that of "*ex antecedentibus et consequentibus fit optima interpretatio*."

Parsons on Contracts, Vol. II., *501 and note ("*u*"), and cases cited.

Under this rule the releasing words are limited in their operation to that which is recited in the previous portion of the instrument as the thing or matter referred to, and for which, therefore, the release is given.

"Thus if a man should receive ten pounds, and give a receipt for this sum, and thereby acquits and releases the person of all actions, debts, duties and demands, nothing would be released but the ten pounds; because the last words must be limited by the foregoing."

2 Roll Abr., 409, A.
Also, 3 Mod. 277.

1 Ld. Raym. 235.
4 Bos. & Pul. 113.

Thus in *Butcher* vs. *Butcher*, 4 Bos. & Pul. 113, where the recital in a release contained particular demands and afterwards general words as, "of and from all or any sum or sums of money, claims and demands . . . . . and all other sum and sums of money, claims and demands whatsoever"; and the one party then released the other, accordingly, from those sums and all claims on account of them, "or for, or on account of any other matter, cause or thing whatsoever"; it was held by the Court that the release only extended to the particular demands previously recited.

So also in *Lyman* vs. *Clark*, 9 Mass. 235, 238–239, A, having a demand on an executor for a legacy of £50, and also another demand for $25, it being her distributive share of a legacy given to her deceased sister, executed a release, under seal with others entitled to a like distributive share, in which release it said, "We ——— have this day received of Eleazer Clark, executor, ... twenty-five dollars each of us as our proportion to the estate that was left the said H. C., deceased, by the said C. C., deceased. . . . . And we do, each one for ourselves, our executors, &c., ... hereby acquit and discharge the said Eleazer Clark from *all demands* we have or may have on him by virtue of the said Caleb's last will. In testimony, &c." It was held that the release had no other operation than to discharge the executor of the particular demand mentioned, and that A was entitled to her legacy. The Court say, "The words used in this release ought not to be extended beyond the consideration." . . . "The plain meaning here is that twenty-five dollars had been paid

to each of the releasers." . . . "This was obviously the cause and occasion of making the release, and it cannot be understood as intended to have any other operation than to discharge the executor from that particular demand."

See also Thorpe *vs.* Thorpe, 1 Ld. Raymond, 235.

And in *Hanson* vs. *Worthington* (above cited), the various residuary legatees under the will executed a release under seal in which they "severally acknowledge each of us to have received of John T. Worthington and Richard Johns, the executors of said deceased," certain sums, "being in full of our respective proportions of the personal estate of the said deceased, as far as the same has come to the hands of the said executors, and accounted for by them with the Orphans' Court for Baltimore County; and in consideration thereof we do hereby release, acquit, exonerate and discharge the said John T. Worthington and Richard Johns, executors, as aforesaid, their heirs, executors and administrators, of and from all and every action, suit, claim or demand which could or might possibly be brought, exhibited or prosecuted against them or any of them, for or on account of our said proportions or the above mentioned sum and sums of money, or the payment thereof, hereby declaring ourselves fully satisfied, contented and paid, as above specified. Given under our hands and seals," &c.

The resemblance between the above receipt and the one under consideration in certain points, will be observed. That was given for the legatees' share of the amount in the hands of the executors, as per their accounts in the Orphans' Court, as ours is for our share of the balance in the hands of the executors, as

per their account rendered to the Probate Court. The Worthington release acknowledged the receipt by the legatees of the sums mentioned, as "being in full of our respective proportions of the personal estate of the said deceased," as accounted for in the Orphans' Court. Ours recites the sum of $2,975.24, then paid to us, as being our full proportional interest and share in the balance of said estate in the hands of said executors, as per their account rendered to the Probate Court.

In the Worthington case the release was given for sums paid to the releasors as direct legatees under the will, while, at the same time, there was another legacy placed in trust for them by the terms of the will. Such is the case with our own release. It was held by the Court in that case that the release was available only to the defendants as *executors*, and was limited in its operations to the rights of the signers as residuary legatees merely (that being the character in which they gave it), notwithstanding the general nature of the words used.

See also Rich *vs.* Lord, 18 Pick. 326.
Rice *vs.* Woods, 21 Pick. 35.
Cooper *vs.* Cooper, 5 N. J. Eq. (1 Stock.), 566.

The general words of a release are also to be restrained by the particular occasion of using them.

Troy Iron and Nail Factory *vs.* Corning, 14 How. 214.

It will be observed that all question of our interest in the 574 26–31 shares of stock which the defendants now hold, is entirely excepted from the effect of the receipt, and cannot be affected by that instrument, in any view of it.

Our claim actually extends to *the whole of those shares*, as being stock to which our trustees are enti-

tled, and to which we are entitled through them, towards making up the property for which they are called upon to account.

We have thus demonstrated, we think, that the receipts in the terms in which they are drawn, do not affect our claim or purport to do so.

But even were it otherwise in respect to the terms used in the receipts, they could not, as between cestuis que trust and their trustees, have the effect to relieve the latter from liability.

The receipts are, in no sense, *compromise* receipts, were not so considered by the parties, do not purport to be such, and ought not be construed or interpreted as such. They are good for the amount actually paid over to the signers. To say that they extend farther than that, is to imply that there is a further amount which has not been accounted for, an exemption from which is sought to be secured under the general words used. It is to imply that outside of and in the absence of these papers, there is a liability which would rest upon the defendants, and as a shield against which they are set up.

If, upon a proper construction of the will, the Court should find that there was a further amount of property belonging to us than that which we had received, then the failure of the defendants referred to to account to us therefor, constitutes a dereliction of their duty and a breach of their trust, until they do so account.

A release to the defendants, given in the manner and under the circumstances in which these receipts

were made, would not avail to relieve the defendants from their liability, no matter how general and full the language employed might be. In order to make even such a release valid and effectual in the hands of the defendants, they should be able to show that it was executed under circumstances which allowed the signers to act with perfect deliberation, that the accounts were exhibited and explained to them; that their rights under the will were fully pointed out and explained; that nothing in the situation of the parties toward each other, occasioned by any action previously had, and adverse to the claims and interest of the *cestuis*, was concealed from them; and that if any dereliction of duty had occurred, it was pointed out. And furthermore, any such dereliction must have been specified in the release; and any misapprehension or error in the *basis upon which* the account is made up and the balance arrived at, deprives the receipt of any validity as a release in full.

See *Perry on Trusts*, *Sec. 923 (2d Ed.)*. "A release by the *cestui que trust* will not be binding unless the parties are made fully acquainted with their own rights and the nature and full extent of the liability of the trustee.

"There should, therefore, be a full statement and detailed explanation of the accounts which should be referred to in the receipt, release, or discharge, especially if there is anything in the nature of a breach of trust. EVEN IF THE ACCOUNTS ARE CLEARLY STATED THE RELEASE WILL BE SET ASIDE IF THERE IS ANY MISAPPREHENSION AS TO THE BASIS UPON WHICH THEY ARE MADE UP."

Wedderburn *vs.* Wedderburn, 4 Mylne & Craig, 41, 47.
Michoud *vs.* Girod, 4 How. 503, 561.

Walker *vs.* Symonds, 3 Swans, 69.
Nicholson *vs.* McGuire, 4 Cranch, 194, 196.
Wheeler *vs.* Smith, 9 How. 55.
Hallett *vs.* Collins, 10 How. 174.
Carter *vs.* Trevelyan, 11 Cl. & Fin. 714.
Penobscot R. R. Co. *vs.* Mayo, 60 Me. 306.

"Acquiescence and release or confirmation, to have the effects we have mentioned, must be understood to be accompanied with the following conditions:

"*α*. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant; and as regards infants, the Court continues its protection, even after they have attained twenty-one, till such time as they have acquired all proper information, and in the case of a formal release being executed by them they must have proper legal advice.

"*β*. The *cestui que trust* must be fully cognizant of all the facts and circumstances of the case.

"*γ*. The *cestui que trust* must not only be acquainted with the facts, but also to a certain extent apprised of the law, or how these facts would be dealt with, if brought before a court of equity."

Lewin on Trusts, p. 755, (6th Ed.).
Lloyd *vs.* Attwood, 3 De Gex & Jones, 614, 641.

"It has been already stated that a release of this description will not be conclusive, unless the releasing parties were made fully acquainted both with their own rights and also with the nature and extent of the liabilities of the trustee. And it would unquestionably

be vitiated by any concealment or withholding of information, or other fraudulent conduct, on the part of the trustee.

"Therefore a full statement of all the accounts and other transactions of the trustee should unquestionably be furnished to the *cestui que trust*, together with all the information requisite for explaining and understanding them. And it is peculiarly desirable that these and all the other material facts should be distinctly stated or referred to in the instrument itself; and this precaution should more especially be observed *whenever the release is intended to apply to any transaction which amounts to a breach of trust.*

"Again, although the accounts are clearly stated or referred to on the face of the release which is founded on the result of those accounts, YET, IF THE BASIS ON WHICH THE ACCOUNTS PROCEED IS ERRONEOUS AND IMPROPER, THE RELEASE WILL NOT PRECLUDE THE CESTUI QUE TRUST FROM ENFORCING A CLAIM AGAINST THE TRUSTEE. . . . .

"A release taken without the observance of all the preliminary circumstances and precautions above stated, cannot be relied upon by a trustee as a discharge from the claim of the *cestui que trust*. And when a proper case has been made out for the interference of the court, relief has been decreed in favor of the *cestui que trust*, notwithstanding the execution of the release, and after a delay of forty years in instituting the suit."

Hill on Trustees, *581–582.

Again, *Perry on Trusts*, Sec. 851 (2d Ed.), says: "But all agreements or contracts between trustee and *cestui que trust* are looked upon with suspicion by the Court, and are closely scrutinized; therefore, in order

that the release, confirmation, waiver, or acquiescence may have any effect, the *cestui que trust* must have full knowledge of all the facts and circumstances of the case: *he must also know the law and what his rights are, and how they would be dealt with by the Court.*"

If it is established that the will gives to our trustees, apon a proper construction of it, the property which we seek here to recover, then there can be no question whatever that the statements upon which the so-called settlements took place, and the receipts were given, were made up upon *an entirely erroneous basis*, since they proceeded upon the theory that only a part of the property was so given for our benefit.

This mistake was at the bottom of the whole transaction; and the exposure and correction of the mistake must sweep away any and all pretended settlements and receipts based upon it. How absurd it would be to hold that the complainants had receipted for and released their claim in a transaction and instrument which proceeded and were founded upon a mutual error of all the parties concerned, in misapprehending the nature of our rights, and in supposing that the will did not give us the very rights which they now say we deliberately signed away.

The authorities we have cited are sufficient to show (even if any were needed) that a receipt or settlement made under such circumstances has no such effect.

We have heretofore discussed the subject of "*mistake*" and the relief which equity affords therefor, in connection with judgments founded upon mistake. What we have said in that connection applies with equal or greater force here, and the rule is clear, even when parties do not sustain the relationship of

trustee and *cestui que trust*, that a conveyance or release, executed under ignorance and mistake, is not binding.

Hill on Trustees, *148–149.

"Upon the same principle, where a party executes a conveyance or release which is founded on entire ignorance or mistake of his rights, even though no fraudulent suggestion or practice be made use of to induce him to act, a court of equity will consider it to be against conscience to take advantage of the party's ignorance, and will relieve against the effects of the instrument. Thus, in the case put by the Lord Chancellor in *Pusey* vs. *Desbouverie*, if an heir-at-law, through ignorance of his right to a lapsed devise, conveys away for a trifling consideration the estate which is the subject of the lapse, the conveyance will not be suffered to stand good; and many other instances in which this relief has been administered, might be adduced. The equity in favor of the injured party will of course be stronger, where the person in whose favor the instrument is made is possessed of more information as to the rights of the other party than that party himself; for that would amount to a case of *suppressio veri*. *But it has been decided that the same relief will be administered where both parties are in an equal state of ignorance.*"

See also, Perry on Trusts, Sec. 184 (2d Ed.).

Hill on Trustees, *584.

"From what has already been said, in considering the effect of a release from the *cestuis que trust*, it will have been seen that such an instrument (however apparently ample and conclusive) can rarely be relied upon as absolute protection against a future claim by the *cestuis que trust*, more especially when the trust has been one of a complicated description, and extending over a long period of years."

See also Salkeld *vs.* Salkeld, Eden's Ch. R. 55.
Broderick *vs.* Broderick, 1 P. W. 239.
Corking *vs.* Pratt, 1 Vesey, 400.

If there ever was a clear case of mistake, it is certainly the one presented by these receipts, if they can be held as covering by their terms our claim to the corresponding or residuary stock, which was left entirely out of account by all parties at the time, and not even mentioned on the occasion, and about our right to which, all labored under a grievous error, which we now seek to correct.

See Testimony of S. P. Colt (Record, pp. 169–172).
Testimony of L. B. B. Colt (Record, pp. 175, 176).
Testimony of F. E. De Wolf (Record, pp. 97–98).
See also Executors' and Trustees' accounts.

But the attempt to set up these receipts, either or both of them, as a release in full of the liability of the defendants, is met by one consideration of so overwhelming a character as to entirely dispose of the question without going farther.

Trustees cannot take a release in full from their cestuis while they retain rights, interests, or property of any kind in their hands belonging to the trust.

If they have fully accounted and transferred to the cestuis the whole trust property, they need no

such release. If they have not, they could not take one.

Consider the effect of holding the receipts to have the effect claimed, it being established that the will gives the trustees for our benefit the stock we are seeking to recover.

Then the trustees, being so entitled by the will have a good claim for the stock, do they not?

If the receipts cut *us* off from our claim to the benefit of it, it follows that the trustees hold their right to this stock as against the estate and all parties detaining it, and at the same time are freed from any responsibility therefor or liability to account to us for it.

Again, the defendants Colt, Hubbard and Jarvis, holding in their double capacity, still have in their hands 574 26–31 shares of stock, which they are entitled to hold and apply toward our legacy, if the will gives us the property we claim. And even the judgment in *Colt* vs. *Colt* is silent as to the ownership or disposition of this stock, which is specifically excluded from the effect of the decision by its own terms. What becomes of this stock? If we are entitled to it, the other legatees are not, and the trustees are not bound or liable to transfer it to them. Should the receipts be held to cut us off, they are not bound then to account for it to anybody.

If the release is operative as such to anybody, it is so to the trustees; and they would thus be getting a direct benefit out of the estate of their cestuis; which is a thing the law does not permit to occur in any way.

We submit that the trustees are not, by virtue of these receipts, discharged from their liability; and that the complainants are entitled to recover in this action the property which shall be found to be given them by the testator's will, upon a proper construction of that instrument.

COMMENTS UPON JUDGE BLATCHFORD'S OPINION.

The learned Judge declines to recognize the very clear evidence of the intent of the testator furnished by the general plan or scheme of his will.

The testator when he made the will had to deal with the disposition of a very large property, consisting of two classes: one being composed of his general estate, exclusive of his stock in the Fire-Arms Company, and the other of substantially the whole stock of that company — about 10,000 shares.

The first great object was to fix upon a principle and plan by which the property might be laid out for distribution to the objects of his bounty. If the task upon him had been that of making a present division of his estate, it would have been in this respect simple and easy. Everything could have been definitely set off by naming particular sums and pieces of property, and certain fixed numbers of shares of stock in each case: and no apportioning residuary clause like the one here made use of would have been needed. And if he had done this, and then by codicil had given over to a separate legatee the subject of one of their legacies, of course no question could have arisen as to what the latter would be entitled to. But he had to look to the future, and to what might be the future condition and amount of his estate. His general estate might at the time of his death be different, and greater or less than at the time of writing.

His stock in the Fire-Arms Company might, or might not, be what it was then; and he had also to provide for children who might be thereafter born. How, then, to fix upon a plan by which both classes of property, as they might be constituted at the time of his death, should be wholly disposed of to and among the selected objects of his bounty according to some rule and system of division so as to leave no intestacy?

It is only necessary to look at the will to see that this is the pervading idea: to establish a principle or rule of division which would divide up his estate into the desired parts and proportions.

He fixes upon this plan. He selects the objects of his bounty. He then takes a certain amount of the stock of the Arms Company and divides it among certain legatees, giving a definite number of shares to each, and provides in the residuary clause that the rest of such stock shall be also shared by the class composed of those taking primary legacies of stock in the same ratable proportions as represented by said primary legacies. This disposes of all the stock and cuts it up into well defined parts or portions. He pursues a similar course with reference to his other property, by giving to those who are to share in it certain definite pecuniary legacies, and then providing that the class of such legacies shall take the residue in the same ratable proportions as are represented by said pecuniary legacies.

It was a plan undeniably established upon a careful study of the matter in hand. In approaching the subject of testamentary dispositions by subsequent codicils, the conclusion seems irresistible that the mind of the testator would regard his estate in the light of the fact that he had subjected it to the method of division he had adopted. And this furnishes a guide to the interpretation of the codicils.

He continues to deal with these subdivisions of his property as thus arranged. He makes changes by codicil, revoking the gifts to some legatees and giving over certain legacies to other legatees: but he nowhere shows or intimates an intention to break up this rule or mode of division.

In his view, therefore, in making the codicils he regards each primary legacy of stock as being united to or accompanied with its corresponding proportion of the residuary stock. We have pointed out the confusion and inconsistency which waits upon any other construction. Among other things, that some of the primary legacies are given subject to conditions which it would be absurd to suppose were not to attach to the whole gift.

And yet is it to be held that a legatee could, by refusing the condition, throw up his primary legacy and thus add it to augment the residuary, and then take of the latter, thus augmented, a share corresponding to his primary legacy? And when primary legacies are given to certain legatees provided they should be in the employment of the Arms Co. at the testator's death: could they, if not then in such employments, take a proportion of the residuary stock, although not entitled to the primary? And that his brother James B. could take the residuary stock without complying with the condition annexed to the primary legacy of relinquishing all claims against the testator's estate? And where he revokes his primary legacy to his brother on account of his "unbrotherly conduct," is it in human nature to believe that he meant his "unbrotherly" brother to take a share in the residuary, augmented by the amount of the same primary legacy denied to him, and freed from the condition referred to?

And other absurdities, following upon such a construction, are pointed out in the Brief. "An intention in the testator to be consistent with himself is always assumed as a cardinal point in construction." (*Morrell* vs. *Sutton*, 1 Phil. Ch. Rep, 551.)

It seems fair to claim that, in placing a construction upon the will and codicils, great weight should be given to the manifest design of the testator in making disposition of his large estate upon a deliberately adopted system or rule of division. In fact it should be the governing idea in fixing the construction. If we are right in this view then it must be held that the substitution of the children of Christopher for the children of James B., in the mode adopted by the second codicil, carries to their benefit also the corresponding residuary stock as united with or accompanying the primary gift, and that the testator had no other object or intent. If he had any different intent it may be asked, would he not have expressed it affirmatively?

Starting out as he did with the plan referred to for the division of his estate, would he not naturally have felt that a gift in the mode adopted would be thought to carry with it the corresponding residuary stock? And if he desired otherwise would not he, or any draftsman employed by him, have inserted words to guard against that result? The absence of any such expression, shows unmistakably upon a natural rule of interpretation, that the testator expected the residuary stock corresponding with the primary legacy to go with it to the substituted legatees.

Again, in holding that the provisions of the second codicil did not, in effect, substitute the children of Christopher as *cestuis que trust* in place of the former

beneficiaries, the learned judge, as it seems to us, erred in his reasoning and the conclusion arrived at. The will gave the primary legacy and its corresponding residuary stock to the trustees for the benefit of the children of Christopher. The codicil revoked this gift only so far as it was for the use and benefit of the children of Christopher. It did not revoke the gift to the trustees and it remained bequeathed to them. The learned judge says that when the testator revoked the gift of the use and benefit, the trust was *ipso facto* gone for want of an object. Now if the testator had simply revoked that use and benefit and *stopped there* this might have been the effect; but he goes on with the subject and at once transfers the beneficial interest in the property composing the primary legacy to the children of Christopher. Thus the gift to the trustees was not revoked but continued: the direction of the use and benefit only being deflected from its original course and object.

It will be observed that the testator does not go through with the formula of giving the property again to the trustees.

He says "it is to be held by my executors for said children in the same manner, etc.," evidently regarding it as already given and remaining given to the trustees.

And it is to be observed that the question here is as to the 500 shares only. We need not confound the matter in this view of it by any question as to whether the language is broad enough to include the residuary. The question may be here confined to the primary legacy. The will gave that to the trustees — the codicil revokes the use and benefit to the children of James B. and *at once, in the same connection*, gives the use and benefit to the children of Christopher, and

directs that it shall be held by the *same trustee* in the *same manner*, etc. Now is this a revocation of the trust because its beneficiary use is taken away; or is it merely a change from one set of beneficiaries to another? If the latter, then the primary legacy remains given to the same trustees; and they are consequently persons and parties to whom stock was given by the original will, and therefore *per se* take the corresponding residuary, even under the meaning imputed to the residuary clause by our opponents. And in the construction of the codicil the rule is, of course, to be applied, that it shall not be considered a revocation any farther than is necessary to render the codicil effectual for the purpose for which it was intended; and this purpose here to transfer the beneficial interest in the primary legacy at any rate from the children of James to the children of Christopher is sufficiently plain.

We respectfully submit also that the learned judge does not seem to us to apprehend correctly the reasoning in the case of *Carrington* vs. *Payne*, which was cited by us and which he considers at some length. His Honor *assumes* that in the present case there is a revocation of the gift to the trustees, whereas there was, he says, in *Carrington* vs. *Payne* only a revocation of the provisions in the will as to the order of settlement. What is the substantial difference, we ask, between a revocation of the settlement of the beneficial interest in the trust property in the order fixed by the will and a gift of the same in a different order (thus plainly revoking the gift of the beneficial interest to one *cestui* and giving it to another)—what is the difference, we ask, between that and the case of a revocation of the gift to or for the use and benefit of one set of beneficiaries and an immediate gift of the bene-

ficial interest in the same primary legacy to another to be held by the same trustees in the same manner, &c.? In either case it is simply a diversion of the beneficial interest from one *cestui* to another, the same trustees continuing to hold the title. If in the one case it is not a revocation, how and why is it so in the other? Justice was clearly done in the case of *Carrington* vs. *Payne* at any rate: and the decision is really put upon the ground of the evident intention of the testator as appearing in that case, considered by itself — just where the decision in cases of this kind ought to be put.

Again the learned judge says, that in framing the codicil "the testator drew no distinction between a legacy to a person and a legacy to his use" — and he thus accounts for the absence of any words revoking the gift to the trustees. But the trust was an existing fact, created by the will in careful terms. It must certainly be considered that in making the codicil the testator had in view the fact of the trust. He certainly did not forget that the property was, by the will, given to the trustees. Even if he confused the matter a little in expression, still the language of the codicil shows that he had in view all the time the fact of the trust, and the trustees' title. Instead of finding anything in the codicil showing that he was oblivious to this, we on our part, point confidently to its language as showing the contrary, and as indicating the conclusion that in the absence of any words revoking the gift to the trustees, it is not revoked, but remains given to them: a new object, therefore, being supplied simultaneously with the withdrawal of that named in the will.

But take the opposite view for a moment and suppose that the testator really wished to cut off the re-

siduary stock from the trust and give over only the primary legacy to the children of Christopher.

In order to judge how the effect of the codicil as it was drawn would strike his mind, observe how it strikes other minds: take the defendant, Gov. Hubbard, for example. He says in his letter to Mrs. Christopher Colt (printed in our Brief, pp. 171-2), "to my mind two things are as certain as that two and two make four. First, that James Colt was not entitled to a share under the will; and next, that the very share that the Court has given to him belongs to your children. Fire will not burn out this opinion. I defy any person who is not afflicted with judicial blindness to come to any other conclusion upon any natural rule of interpretation." It must be considered that the testator would apply a "natural rule of interpretation" to what he was doing. As it struck the mind of Gov. Hubbard, so it strikes other minds, and there can be no reasonable doubt that such was the view presented to the mind of the testator.

If, then, he had not intended the primary legacy when given over to the substituted legatees to carry with it its corresponding residuary stock, would he not have inserted a provision to guard against that so naturally to be expected result?

But even if we take the view of the learned judge, that the testator in making the codicil did not discriminate between a gift in trust and a direct gift, and so, notwithstanding the absence of words revoking the gift to the trustees, the codicil is to be considered as giving the subject of the primary legacy *over again* to the trustees for our benefit: still the result would be that this presents a case of a *substituted legacy*. The legacy in the codicil is in that view of the case *substituted* for the primary legacy in the will, and the

codicil legatees are substituted legatees thereof. The property given is identically the same, and is so referred to, and is given and to be held in precisely the same manner. There seems to be no possible doubt under the authorities that this would be a case of substitution. As such it would carry with it all the incidents of the original legacy.

By the will, those taking primary legacies of stock under it are constituted a class to whom the residuary stock is given. That this is a *class* is necessarily implied by the decisions heretofore made in this case, wherein revoked legacies and proportions are made to fall into and augment the common fund of the residuary and go to the remaining members of the class. And it is clear that the testator intended a class in our view of the scheme and plan of the will. But, we submit, at the same time, that this holding in effect that there was a class and that revoked legacies of stock would become "*remaining stock*" as not disposed of by the will and codicils taken together, (although absolutely bequeathed by the will and thus not being "*remaining* stock" at the making of the original will) implies that our view is the correct one; and that the will and codicils are to be taken together as showing who constitute the class, as well as what they are to take.

The testator does not mention the legatees by name who are to take the residuary. He had a reason for not doing this. He chooses to adopt a classification of them under the general description and character of those to whom primary legacies were bequeathed. Effect should be given to the indication of his meaning presented by the adoption of this mode of designation. By the codicil, then, if he revokes everything given to certain primary legatees, and substitutes others as legatees of the primary legacy in their stead,

shall not the substituted legatees succeed to the membership of the class as an incident thereof? In deciding against us as to the effect of this substitution, the learned judge relies upon the ruling in "*In re Gibson's Trusts*" (2d Johnson & Hemming 656). But no notice is taken of the fact that the gift of the residuary in that case was to certain of the prior legatees and was expressly held to be given to them as *individuals* and not as a class. And the decision in that case was based upon a ruling of the Vice-Chancellor, "*In re More's Trusts*" (10 Hare 171), that the rule as to the effect of substitution "cannot be applied to a case where" (as there) "its application would alter the limitations of property." That expression refers to cases where the devise or bequest made by the will is to one for life or years with remainder over, and other cases of similar limitations: and the codicil bequest in that case was an *additional* and not a *substituted* legacy.

No such question is presented here. The question here is whether these *substituted* legatees take what their predecessors would have taken in the residuary stock: and the question arises here for the first time whether such substituted legatees shall not be held to succeed to the *class* to take the residuary stock under the terms of the will, as a direct incident of their substitution for the original legatee.

We contend that his Honor's decision in regard to the validity of the claim of James B. Colt to a share of the residuary stock, notwithstanding the revocation of his primary legacy, is not in conformity with a correct construction of the will.

The suggestions made by us already are, if we are correct, a sufficient answer to that claim. What can

we suppose would have been the opinion of the testator as to the possibility of such a claim being made and sustained? To other minds it appeared baseless enough. His Honor says in his opinion:

"It is not probable that any party or counsel comprehended fully in advance the scope of the decision in favor of James B. as it appeared afterward. His claim was looked upon as foolish, wild, and crazy, and so, what all the effects of his success might be were not likely to be appreciated beforehand."

A claim to make this impression must be of a startling character and based upon a theory which one would not be likely to anticipate from a reading of the will upon ordinary and natural rules of interpretation. But we are asked to believe that the testator expected such a claim to be made and to be allowed.

On the contrary, if such had been his intent would he not have inserted language to guard against the effect thus produced? In other words, if he had any such intent can it be reasonably supposed that he would have undertaken or expected to carry it out by the method here adopted?

But we do not accede to his Honor's opinion that the claim of James B. stood upon the same grounds as our own. On the contrary our claim presents other and important questions, as we have seen, and which we shall refer to again presently in our comments upon another part of his Honor's opinion.

Passing from the question of construction, let us for a moment consider his Honor's reasoning and conclusions with reference to the question of *res adjudicata*,

growing out of the decision in the James B. Colt case. His Honor holds that notwithstanding the fact that the trustees of this legacy were not, as such, parties to that suit, but were only made defendants in their capacity as executors, that judgment binds us and the trust property, and operates as an estoppel against our claim. Why should it? This suit is not between the same parties as those of the case referred to. This suit is brought against the defendants, Colt, Hubbard and Jarvis, as trustees. That suit was not so brought.

It was an action against them only as executors, and their answer in the present case states that they did not appear as our trustees. Now, in order to have constituted the questions in this case *res adjudicata*, it certainly must appear that the parties between whom the issues are here raised were parties to the former suit, and in the same capacities. "It is not sufficient," says Wells in his work on *Res Adjudicata*, "to satisfy the requirements of the rule of *res adjudicata* that the same persons are litigants in the two actions. For the same person may in law be considered as another person, and consequently another party by suing in a different capacity." Of course, in order to support his Honor's conclusion it must appear that the capacity occupied by these defendants as executors and their capacity of trustee for the children of Christopher Colt, was the same in law. But it has been decided over and over again that their relations and capacities in these two positions are separate and distinct.

Says *Perry on Trusts*, "If a testator in his will appoint his executor to be a trustee, it is as if different persons had been appointed to each office." "They are legally as distinct," says Chief Justice Appleton (in a Maine case cited in our Brief), "as if they were different individuals." Nothing is more clearly and

decisively settled by the authorities than this point. We have made ample references thereto in the Brief, and there is nothing stated in his Honor's opinion which in any way answers them or the reasoning of the cases and authors cited, or in any way shows that they are not entirely applicable to the present case.

These defendants were, at the time of the James B. Colt case, holders of the legacy as trustees and actively engaged in the administration of the trust thereof, as shown by the evidence. Being made parties to that case only as executors, they went before the court with a brief opposing the claim of the *cestuis que trust* and argued the case against them on the trial. If they had been made parties as our trustees they could not have denied the title of their *cestuis* or their own title as trustees.

One of the principal duties of a trustee is stated in the books to be that of defending the title to the trust property when it is attacked. "Under no circumstances" says Perry, "can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust*. Nor can he deny his title." And in *Williams* vs. *Gibbs* (also cited in our Brief), this Honorable Court says:

"The duty of a trustee, whether of real or personal estate, to defend the title at law or in equity in case suit is brought against it, is unquestioned."

Now if the Court find that upon a proper construction of the will, the plaintiffs were entitled to the beneficial interest in the residuary stock, then it was a part of the trust property and the trustees could not deny their title to it. If they had been made parties as trustees, their duty in this respect would have been presented to them in so clear a light that it may be assumed that they would never have thought of plac-

ing themselves before the court in the position of denying the claim of title of themselves and their *cestuis*. But the learned judge expresses it as his opinion that having at one stage of that case opposed the claim of James B. Colt (which, so far as it went, was adverse to that of the *cestuis*), they might in a subsequent stage of the case turn around and *deny* and *oppose* the claim of the *cestuis*. Where can be found any authority or foundation for such a position as this? Was it in the province of the trustees to seek to extend the evil effects of that decision to the case of their *cestuis* instead of seeking to limit it and to show that it did not sweep away their rights? Perhaps it afforded the defendants a measure of satisfaction to bring home to the Court the enormity of their decision against them upon the James B. Colt claim, by endeavoring to make out that that decision also destroyed our own claim, and thus led to an undeniably plain and palpable injustice. If they had been held up to their duty, by being made parties as trustees, and had agreed in our favor instead of against us, and had sought to show the different position occupied by our claim, and that it might well be sustained, notwithstanding the other decision, there is good reason to believe that the effect would have been different from that produced by their contending that the Court must eat their own words if they decided in our favor.

But is the learned judge correct in assuming that the ground of opposition set up against the claim of James B. Colt covered the entire ground supporting our claim? Let us see.

In the case of James B. Colt there was a gift of a primary legacy of stock and a gift by the residuary clause of a corresponding proportion of the residuary stock. Then there was by codicil a revocation of the primary legacy, but *no revocation* in terms of the resid-

uary. And the Court held that the residuary was therefore unrevoked.

In our case there is a gift by the will of a primary legacy to trustees, for the benefit of certain *cestuis* and a gift of a corresponding proportion of the residuary stock.

And by codicil there is a complete revocation *of all the gifts* both *primary and residuary*, so far as they are for the use and benefit of the children of James B. and a contemporaneous transfer of the beneficial interest, as we say of the whole property, and as our opponents admit of the primary legacy — to the children of Christopher: to be held by the same trustees "in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of James B. Colt." Here the beneficial interest of the children of James B. in the residuary stock is taken away from them, and there was, therefore, no possible claim on their part. In the case of James B. Colt he claimed the residuary on the ground that it had not been revoked. If it could be said that in the case of James B. Colt the omission to revoke the residuary legacy showed an intention of the testator not to have it go to the substituted legatee, the same thing could not be said in our case. On the contrary, the withdrawal of both primary and residuary from the original beneficiary legatees and the simultaneous transfer of the beneficial interest embraced by the codicil to the substituted *cestuis* was strong evidence of the intention of the testator that the latter should have all that he had in the same breath withdrawn from the former.

Then, in our case the gift to the trustees was not revoked by the codicil. And again, if it had been, the gift over would be a *substituted legacy* for that

in the will; and the question further arose, whether the substituted legatees would not come into the class to take the residuary, as an incident of taking the primary legacy.

None of these questions could arise in the case of the James B. Colt claim. Was there no duty upon our trustees to present and urge these distinctions instead of endeavoring to make out that no such distinctions existed?

The object of making a gift to trustees is that there should be guardians of it against the attack of all opponents, and even against the possible injurious acts and conduct of the *cestuis* themselves. If the conclusions of the learned judge are correct, this safeguard in the case of testamentary trustees is thrown down. But notwithstanding previous adjudications upon the subject of the distinct capacities of individuals occupying the double position of executors and trustees, is it now to be established by this Court as the law of the land, that hereafter in all cases involving the title to property given to executors in trust it shall be unnecessary to make them parties in their capacity of trustees?

We have seen what the effect of such a course has been in the present case in liberating them from any feeling of liability to their *cestuis* for their proceedings in the other capacity. To hold with the learned judge would be contrary to the spirit of the law, and especially to that which governs in equity in favor of the protection of the rights of *cestuis*.

We need not lengthen this discussion by considering the reasoning of the learned judge in reference to the alleged appearance of the *cestuis que trust*, in the

Connecticut case, without the appointment of guardians, *ad litem*, although most of them were minors. We differ with his Honor in concluding that the evidence shows that there was any appearance for the minors. But however this may be, we think it is plain that the law will not permit a *cestui* by any thing he may do to deprive his trustee of the title given to the latter to guard against everybody, even against the *cestui* himself.

We feel great confidence in its being found by the Court that the will and codicil, upon a reasonable and natural interpretation, give to our trustees a portion of the residuary stock corresponding to the primary legacy. And this being so, our trustees could not deny or oppose their title to it. Nor could a judgment depriving them of it be obtained, except in a suit against them in their capacity as such.

Lucius S. Ashley

Perry F. Thurston

APPENDIX.

STATUTES PRESCRIBING THE JURISDICTION OF THE PROBATE COURTS IN CONNECTICUT, MASSACHUSETTS, AND MAINE.

The citations are from—

The General Statutes of Connecticut, Revision of 1866.
The General Statutes of Massachusetts, Edition of 1860.
The Revised Statutes of Maine, Edition of 1871.

CONNECTICUT.

TITLE II.

§ 73.—The Courts of Probate in their respective districts shall have cognizance of the probate of wills, the granting of administration, the appointing and approving of guardians, and shall act in all testamentary and probate matters, and in every other matter in which it shall be legal and proper for a Court of Probate to act; and said courts shall have and exercise all the powers conferred on them by the act relating to the settlement of estates, by the law relating to guardians, the law relating to idiots, lunatics, and spendthrifts, the law relating to escheats, and all other powers conferred on them by law.

MASSACHUSETTS.

CHAP. 117.

§ 2.—The Probate Court for each county shall have jurisdiction of the probate of wills, and granting administration of the estate of persons who at the time of their decease were inhabitants of, or resident in the county, and of persons who die without the state, leaving estate to be administered within such county; of the appointment of guardians to minors and others, and of all matters relating to the estate of such deceased persons and wards; and of petitions for the adoption of children and the change of names.

§ 6.—The judge [of probate] for each county may take the probate of wills, grant letters testamentary or of administration on the estates of all deceased persons, who at the time of their decease were inhabitants or residents of his county, or who died without the state, leaving estate to be administered in his county, or whose estate is afterwards found therein; also on the estate of any person who is under sentence of death, &c. . . ; and shall have jurisdiction of all matters relating to the settlement of such estates. He may appoint guardians for minors and others according to law, and have jurisdiction as to persons under guardianship, and to whatever else is conferred on them by law.

STATEMENT

OF THE BEQUESTS OF STOCK BY THE WILL AND CODICILS.

I.

Distribution of the Primary Legacies of Stock by the Original Will.

By the original will, the testator bequeathed *primary* legacies of stock as follows:

To his widow, for life, remainder to children thereafter born	1,000	shares.
To his children thereafter born, each 500 shares.		
" James B. Colt, for life, remainder to his issue	500	"
" the Executors in Trust for the issue of J. B. Colt	500	"
" Samuel Caldwell Colt	500	"
" The five children of Christopher, each 100 shares	500	"
" Luther P. Sargeant, on condition	50	"
" Elisha K. Root, " "	50	"
" Milton Joslin " "	50	"
" J. Deane Alden " "	25	"
" Trustees for the School of Engineers	2,500	"
" His Executors, each 50 shares	150	"
	5,825	"

To be increased by 500 shares for every child thereafter born to him in lawful wedlock.

II.

Effect of the Codicils.

By the first codicil the testator,

1. Revokes the legacy of 500 shares to James B. Colt, for life, remainder to his children, and gives it to the trustees for the School.

2. Gives J. Deane Alden 50 shares in place of 25 shares.

3. Revokes the legacy to the eldest son of Christopher, and gives him "one-fourth part of what he would have received if the legacy to him in said original will had not been revoked."

By the second codicil the testator,

1. Revokes the legacy to the Trustees of the "School" and "abolishes" the same.

2. Substitutes the children of Christopher (except the eldest) for the children of James B., as beneficiaries of the legacy in trust to the executors.

3. Revokes legacies to the eldest son of Christopher.

The *primary* legacies of stock therefore vary, as follows, according to the provisions of the will and codicils, viz.:

Primary Legacies.	Shares by Will.	By Will and first Codicil.	By Will and both Codicils
To the widow, for life, etc.	1,000	1,000	1,000
" James B. Colt, for life, etc.	500	——	——
" The Executors in Trust	500*	500*	500†
" Samuel C. Colt	500	500	500
" The eldest son of Christopher	100	25	——
" The four other children of Christopher.	400	400	400
" Luther P. Sargeant	50	50	50
" Elisha K. Root	50	50	50
" Milton Joslin	50	50	50
" J. Deane Alden	25	50	50
" Trustees for School	2,500	3,000	——
" His Executors	150	150	150
	5,825	5,775	2,750

To each of these totals must be added 500 shares for each child thereafter born to the testator.

* In trust for the issue of J. B. Colt.

† In trust for the children of Christopher Colt, except the eldest.

III.

COMPLETE DISTRIBUTION OF THE STOCK BY THE ORIGINAL WILL.

When the testator died, he left two children surviving; two others had been born to him and deceased after the making of the will.

The legacies to Joslin and Alden failed to take effect, the condition not being fulfilled.

If, therefore, there had been no codicils, the shares of stock would have been distributed as follows:

	Primary Portion.	Residuary Portion.	Entire Legacy.
To the widow for life, etc.....	1,000	289 25-31	1,289 25-31
" the two surviving children..	1,000	289 25-31	1,289 25-31
" two deceased children (by statute treated as intestate estate in Connecticut)....	1,000	289 25-31	1,289 25-31
To James B. Colt, for life, etc..	500	144 28-31	644 28-31
" the Executors in trust.....	500	144 28-31	644 28-31
" Samuel C. Colt.....	500	144 28-31	644 28-31
" the five children of Christopher.....	500	144 28-31	644 28-31
" Luther P. Sargeant	50	14 15-31	64 15-31
" Elisha K. Root.....	50	14 15-31	64 15-31
" the Trustees for the School.	2,500	724 16-31	3,224 16-31
" the three Executors.....	150	43 15-31	193 15-31
	7,750	2,246	9,996

IV.

Distribution of the Stock by the Connecticut Court.

The Connecticut Court distributed the stock as follows:

	Primary Legacy.	Residuary.	Total.
To the widow, for life, etc.....	1,000	1,149 21-31	2,149 21-31
" the two surviving children..	1,000	1,149 21-31	2,149 21-31
" the two deceased children (intestate estate).....	1,000	1,149 21-31	2,149 21-31
" James B. Colt, for life.....	——	574 26-31	574 26-31
" the Executors in trust for the children of Christopher (except the eldest).	500	——	500
" Samuel C. Colt..... ...	500	574 26-31	1,074 26-31
" the children of Christopher (except the eldest) .	400	459 27-31	859 27-31
" L. P. Sargeant.....	50	57 15-31	107 15-31
" E. K. Root.....	50	57 15-31	107 15-31
" the Executors.....	150	172 14-31	322 14-31
	4,650	5,346	9,996

V.

Advantage accruing to our Trustees by the Decision adverse to the interests of their cestuis que trust, if sustained.

The residuary stock belonging to our trustees in their individual and representative capacities, was augmented by the decision of the Connecticut Court adverse to our interest, as follows:

	SHARES.	SHARES.
Mrs. Samuel Colt:		
From primary legacy of 1,000 shares	111.19-31	
From distributory share in "intestate estate"	37. 6-31	
As Executor	5.18-31	
As Guardian of her son, from his primary legacy	55.25-31	
From his share in "intestate estate"	37. 6-31	—247.12-31
R. W. H. Jarvis, as Executor	5.18-31	
As Administrator on the estate of his niece.		
From her primary legacy	55.25-31	
From her shares in "intestate estate"	37. 6-31	— 98.18-31
R. D. Hubbard, as Executor	5.18-31	— 5.18-31
Total		351.17-31

111-561

OFFICE SUPREME COURT U.S.
FILED
APR 15 1884
JAS. H. McKENNEY, Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1883.

No. 343.

LeBaron B. Colt et als, Appellants,

vs.

Elizabeth H. Colt et als, Appellees.

Appeal from the Circuit Court of the United States for the District of Connecticut.

BRIEF FOR THE DEFENDANTS.

CHARLES E. PERKINS,
ALVAN P. HYDE, } *Of Counsel.*

HARTFORD, CONN.:
The Case, Lockwood & Brainard Company.
1884.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 343.

LEBARON B. COLT, *et al.*, APPELLANTS

vs.

ELIZABETH H. COLT, *et al.*, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF COUNSEL FOR THE APPELLEES.

Statement of the Case.

Samuel Colt of Hartford, Connecticut, died in 1862, leaving a will with two codicils.

At the time of his death he owned stock of the Colt's Patent Fire Arms Manufacturing Company, a corporation located in said Hartford, portions of which stock he bequeathed to various legatees by said will, and among others to his brother, James B. Colt, and his children by the following bequest. (Record, p. 56.)

"To my brother James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement during his life of five hundred shares of the stock of said Colt's Patent Fire Arms Manufacturing Company, and after the death of my said brother, to his issue lawfully begotten as an absolute estate."

He also gave certain shares of said stock to the plaintiffs in this case.

The will also contained the following residuary claim. (Record, page 60.)

"All the rest and residue of my estate of every kind and description not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire Arms Manufacturing Company, of which I shall die possessed *shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given.* All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies; *meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions,* and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions."

By this provision James B. Colt, and his children, took such a proportion of the residuary stock as the five hundred shares given to them, bore to the whole amount bequeathed.

The first codicil contained this clause. (Record, p. 61.)

"I also revoke and cancel for reasons growing out of his late unbrotherly conduct towards me *the legacy of five hundred shares of the stock* of Colt's Patent Fire Arms Manufacturing Company given in the aforesaid will to James B. Colt for life remainder to his children, and in lieu thereof I give and bequeath *said five hundred shares of said stock* to the trustees named in said will, for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

The testator in said will (Record, page 56), had given five hundred other shares of said stock to his executors for the benefit of the children of said James B. Colt, and the second codicil contained this clause. (Record, p. 62.)

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke *any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children or any of them.*"

By the next clause of the codicil the testator gave the five hundred shares which were given by the will to the children of J. B. Colt to the plaintiffs, the children of Christopher Colt.

Upon the death of the testator two questions arose as to the effect of these bequests upon the division of the residuary stock.

James B. Colt claimed that the provision in the first codicil, which in terms revoked "*the legacy* of five hundred shares of stock" to him, with remainder to his children, only revoked that specific legacy, and did not affect the part of the undevised stock which he took under the residuary clause. He also claimed that the bequest to the children of Christopher Colt contained in the second codicil, of the second five hundred shares, did not give them any residuary share, as the residuary clause spoke only of the persons "to whom I have *hereinbefore* given legacies of stock," and this bequest, being contained in a *subsequent* codicil, did not make those legatees as regarded that stock persons to whom the testator had "theretofore" given stock within a proper construction of that residuary clause.

In 1864, James B. Colt brought a bill in equity to the Superior Court for Hartford County, Connecticut, which is found on page 50 of the record, against the executors of the will, and making parties thereto all the legatees under the will, including these plaintiffs, which petition contained the following clauses. (Record, p. 54.)

"And this petitioner avers that the respondents to this petition and each of them have a claim to have some interest legal or ben-

eficial in said residuary portion of said stock, and that it is necessary that they and each of them should be made parties to this proceeding *that their respective rights in said residuum may be so ascertained and fixed as to be binding on all said parties;* and this petitioner avers that each of said respondents had notice of all facts herein alleged from time to time as the same occurred.

"This petitioner therefore prays this Court to *ascertain and fix the amount of said residuum and the parties entitled thereto and their proportions under said will,* and especially that this Court would ascertain and fix the number of shares in which this petitioner has an interest under said will."

This petition was served personally on all of the respondents, including all of the plaintiffs in this case, as appears on pp. 64 and 65 of the record, by the return of the officer, and on their mother Mrs. Thedora De Wolf Colt, who was the guardian of LeBaron, Samuel, and Edward, who were then minors; and Henry C. Robinson, Esq., a counsellor at law of Hartford, appeared for their plaintiffs and acted for them throughout.

The executors also employed counsel who appeared generally for all the respondents, and these counsel filed a demurrer to the bill, and the Superior Court, according to our practice in Connecticut, reserved the questions arising upon the demurrer for the advice of the Supreme Court of Errors, which is the highest court of the State. The case was heard at the February Term, 1865, the principal question being whether the clause in the first codicil revoking the primary legacy of five hundred shares of stock to James B. Colt, also destroyed and revoked as to him the residuary bequest, so that he took no interest in the residuum.

This was really the vital question in the whole case upon which every other question turned; and it was evident that the same principle which applied to the interests of James B. Colt, would also apply to the children of Christopher. The claim of J. B. Colt was, that the residuary devise was

an independent one, not connected with the former ones in any other manner than as determining by reference to them who the *persons* were who were to take under it, and it was to be read as if instead of saying "the several persons and parties to whom I have *hereinbefore* given legacies of stock" it had enumerated them by name. If this claim was correct, it was evident that it covered the case of the interests of the children of Christopher in relation to the 500 shares given to them under the second codicil, for if the words "persons to whom I have *heretofore* given stock" meant heretofore and not hereafter, it was clear they were not included.

For this reason, before the argument in the Supreme Court of Errors, Mr. Hubbard the acting executor called upon Mrs. Theodora Colt, the widow of Christopher, the mother of these plaintiffs, and the guardian of three of them who were then minors, and told her that he had heard that she and her children were not going to join in opposing James B. Colt's claim (or Judge Colt, as he was sometimes called) that he thought it would be a great mistake, and injurious to the interests of her children, but she replied that she did not wish to join in opposing James B. Colt's claim. Mr. Hubbard also applied to Mr. Robinson who was acting in the case for Mrs. Theodora Colt and her children, and urged him to induce his clients to act with the executors on this question, but Mr. Robinson also stated that his clients had instructed him not to act adversely to J. B. Colt's claim, and in fact he did not take any part in the argument. These facts will be found stated on pp. 109–110 of the Record.

The executors however to protect in the best manner possible the best interests of all the legatees for whom they acted, including these plaintiffs, employed the Hon. Benjamin R. Curtis of Boston, to argue the questions in the case, assisted by W. W. McFarland, Esq., now of New York, and the case was as thoroughly and fully argued upon that side as it was possible to be, and is reported in volume 32 of Connecticut Reports, p. 422.

The Court overruled the demurrer and decided that the revocation in the first codicil only extended to the primary legacy to J. B. Colt, and did not affect his interest under the residuary devise which was an independent and separate legacy, and that the expression "persons to whom I have *hereinbefore* given shares of stock" was used only to specify certain persons as if it had named them.

It will be seen at once that this principle of construction applies equally to the claim of the children of Christopher Colt to share in the residuum by virtue of the bequest of 500 shares of stock made to them by the second codicil. As to those shares they were not "persons to whom the testator had hereinbefore" given shares of stock, and it was in view of the possibility of this decision that Mr. Hubbard warned Mrs. Theodora Colt and her counsel that the decision on this demurrer might seriously affect the interest of her minor children. The construction contended for by J. B. Colt disposed effectually of their claim.

Their interests therefore was the same as that of the executors and all the other legatees except J. B. Colt, and the executors in their efforts against the claim of J. B. Colt were also striving for the benefit of these plaintiffs.

This advice of the Supreme Court of Errors was followed by the Superior Court. The demurrer was overruled and issue was joined by a general denial, which was according to the form of equity practice in Connecticut, and after a hearing, that Court made a finding of the facts in the cases, found on p. 66, and subsequent of the record, finding among other things as a fact, "the parties appeared by their respective counsel *and the said minors were duly represented by their guardians.*"

Instead of deciding the legal questions arising upon these facts, the Court again reserved them for the advice of the Supreme Court of Errors, and specified certain questions

upon which their advice was asked, two of which were as follows (p. 68 of Record):

"4. Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will.

"6. What is the amount of the residuum of the stock, and who are entitled thereto and in what proportions."

The Supreme Court of Errors advised the Superior Court (page 69 of Record) that the children of Christopher Colt took no share in the residuum in respect to the legacy of 500 shares given them by the codicil, that James B. Colt took a life estate in the residuum in respect to the legacy of 500 shares to him, and stated in full the rights of all the legatees in the residuum in exact figures to a fraction.

Before this second hearing was had in the Superior and Supreme Courts, Mr. Hubbard again applied to Mrs. Theodora Colt and to Mr. Robinson as her counsel to know if they desired the executors to act for them, and their answer is best stated in Mr. Hubbard's words, on page 110 of the record.

"When the case broke in such form that the interests of Christopher Colt's children in the residuary legacy came into jeopardy, I put myself into communication with Mrs. Christopher Colt, explained to her the situation, and told her that there might be serious danger to the interest of her children, and asked her what course she desired should be taken for the protection of their rights in the determinations which were about to be made in the cause. She informed me that she had not the largest confidence in the executors, though she was so kind as to say that so far as I, personally, was concerned she had no ill-feeling or distrust. I told her that so far as I knew there was no ill-feeling on the part of any of the executors to her children, or to their interests under the will. She replied that she did not wish to discuss that matter with me further; that Mr. Henry C. Robinson was the counsel of herself and children, and would act for them in the determinations which were about to made in reference to their interests, and that consid-

ering the relations which were existing, the family preferred to have their own independent counsel for the maintenance of their rights. I ought, perhaps, to have said that after judgment in the suit on demurrer, the facts, with reference to the several interests of the stock legatees necessary for judicially determining the measure of these interests were found by the Court, and the case reserved for the advice of the Supreme Court of Errors. Mr. Henry C. Robinson acted in the matter of the findings, and also in the argument of the question for the children of Christopher Colt, both in the Supreme Court and the Supreme Court of Errors.

"A decision was made by the Supreme Court in respect to the number of shares, primary and residuary, of the several stock legatees.

"I, myself, whilst the question was pending, and before argument, took the trouble to have friendly consultations with Mr. Robinson in respect to his case, and made such suggestions as occurred to me as a lawyer, in aid of his points."

In accordance with the desires of Mrs. Theodora Colt, Mr. Robinson took charge of the interests of these plaintiffs both in the Superior and Supreme Courts, he prepared a brief and argued the case in the Supreme Court of Errors, citing authorities as shown by the memoranda of the reporter on pages 160, 161 of the Record, and also in the report of the case in vol. 33 of Connecticut Reports, page 270. On page 278 of that report it states among the counsel, "H. C. Robinson for the children of Christopher Colt."

The Supreme Court of Errors in reply to the fourth question, as to the interest of the children of Christopher in the residuum in respect to the shares given by the second codicil was on page 280.

"4. The fourth question must be answered in the negative. In giving a construction to the will we held that the residuum was given independently to the persons and parties to whom stock was *thereinbefore* given. It follows logically that persons and parties to whom stock was not *thereinbefore* given cannot take under the residuary clause."

It clearly appears therefore from this summary of the facts that these plaintiffs were made parties to the suit of J. B. Colt, that they had personal service made on them, appeared by counsel and had the questions relating to their rights fully presented, which questions were exactly the same ones which they now endeavor to have considered in this case, and that the Court passed not only upon their claims, but on the claims of all the legatees, and decreed specifically just how the residuum should be divided, and just how much of it these plaintiffs were entitled to receive.

At the same term of the Supreme Court of Errors, and reported next to the last-named case at page 281, volume 33, Connecticut Reports, was heard another case between Edward D. Colt, one of the said minor children who had then become of age, and whose interest is now owned by his mother, Mrs. Theodora Colt, and the executors, in which Mr. Robinson represented the interests of these petitioners, and agreed with Mr. Hubbard for the plaintiffs here, that it should be a test case to decide the rights of all the children as well as Edward D., who was the only plaintiff in that suit.

After the decision of these two suits, as it was supposed that they disposed of all questions relating to the stocks, the executors proceed to settle the estate in accordance with the principles therein laid down. They prepared their administration accounts, showing them to Mr. Robinson who was acting for these plaintiffs, and in connection with him had distributors appointed who made distribution of the stock and other property, which distribution was accepted by the Court of Probate. The executors thereupon distributed and conveyed the stock to the petitioners and others, and paid over large sums of money as back dividends on the stock, and otherwise and substantially disposed of the estate. These payments and transfers were substantially all made in 1866. Some comparatively small sums remained in the hands of the executors after this settlement in 1866, and another partial settlement of the account of the executors, and payment under it was

made in 1870. A third and final settlement of everything remaining was made in 1873, thus closing up the whole estate except the residuary shares in which James B. Colt had a life estate. These amounting to $575\frac{26}{31}$ shares are now in the executor's hands, James B. Colt having since died, but beyond these they have no other money or property of the estate in their hands. These accounts, orders, and proceedings of the Court of Probate, and releases appear on pages 120 to 159 of the Record.

No appeals were ever taken from the orders or decrees of the Court of Probate accepting said accounts or distribution, and the same remain as passed. The Court of Probate found as appears that legal notice of all said decrees and orders was duly given, and it appears from the testimony of Mr. Hubbard and Robinson, pages 106, 113, 114, that special notices by letter were sent to these plaintiffs, that Mr. Robinson had full knowledge of all the proceedings and appeared and acted for these plaintiffs therein as their counsel.

At the last settlement in 1873, all these petitioners, who were then all of full age, were present either by themselves, or attorney, and it was well understood that this was to be a final settlement, ending and disposing of everything except the $575\frac{26}{31}$ shares, and they being all present in Mr. Hubbard's office, he showed them this final account, concluding the settlement of the estate, and said to them (p. 117, Record):

"Now, gentlemen, the administration of this trust has been a long one, and not without some embarrassment. Jim Colt (meaning James B. Colt) is giving out threatenings and slaughter touching this very fund which we are now about to pay over to you. Now if this is satisfactory to you, and if it is not, ask me now and I will try to make it so. I want you to give us a *full and complete discharge of everything under the will, both the administration account, and the trust fund account*, and so that we may be forever put to rest in respect to everybody except Judge Colt, whom we may have to fight with our own money after we have delivered over to you the whole trust estate."

The present plaintiffs agreed to give such a discharge, and it was drawn up, put under seal, and signed as follows, Record p. 138:

"Received, Hartford, January 11, 1873, of Mrs. Elizabeth H. Colt, R. D. Hubbard, and R. W. H. Jarvis, executors of the late Samuel Colt, deceased, the sum of two thousand nine hundred seventy-five dollars and twenty-four one-hundredths ($2,795.24), being our full proportional interest and share in the balance of said estate in hands of said executors, as per their final administration account this day rendered and accepted in the court of probate. And having previously received in full the various other sums, legacies, annuities, devises, and distributions, coming to us under said will and previous settlements, and administrations to our entire satisfaction, we hereby, in consideration thereof, release, discharge, and acquit the said Colt, Hubbard, and Jarvis, executors as aforesaid, of and from any and all further accountings, actions, and causes of actions, excepting, however, the question of our interest in the remainder of the $574\frac{8}{31}$ shares of the capital stock of the Colt's Patent Fire Arms Manufacturing Co. bequeathed in said will to James B. Colt for life, the title to said remainder being undetermined.

ISABELLA C. DEWOLF, [SEAL.]
By F. E. DEWOLF, *Attorney*,
SAMUEL P. COLT, [SEAL.]
LEBARON B. COLT, [SEAL.]
THEODORA DEW. COLT. [SEAL.]

Assignee by purchase of the estate of Edward D. Colt remaining after settlement of administrator's account.

By HENRY C. ROBINSON, *Her Attorney.*

This final settlement and release, was dated January 11, 1873, and nothing further was done, and no claim whatever was made by these plaintiffs that there was anything erroneous in all these proceedings, until the *fourth day of January*, 1879, *just seven days before the six years of the statute of limitations would have run*, when the plaintiffs filed this bill and took a subpœna which was served January 6, 1879.

Now, after all these proceedings of the Court of Probate, the Superior Court, and the Supreme Court of Errors, and all

these transfers and payments made in pursuance of such decisions in 1866—thirteen years before, these plaintiffs came into this court as a Court of Equity, and ask that all these decisions, accounts, settlements, and payments, be declared to be entirely wrong, set aside, vacated, and tried over again. That this court should retry the questions of the construction of the will decided by the Supreme Court of Errors of the State of Connecticut, and under which this estate was settled, and say that the decision of that court was all wrong, that the estate should now again be settled on another basis, and that these executors should now be held to account to these plaintiffs for the residuary stock which the Court of Errors decided they were not entitled to, and which has been distributed to other persons, and also for hundreds of thousands of dollars of dividends on those shares which have long ago been paid to others.

All these facts and many others are set out with extraordinary clearness and fullness in the first part of Judge Blatchford's opinion found on p. 213 of the Record.

POINTS.

The grounds of defence set up by the defendants in this suit by their answer may be comprised under five heads:

I. The judgment in the suit of James B. Colt in the Hartford Superior Court is conclusive upon these plaintiffs as to the proper construction of the will.

II. The decrees of the Court of Probate, approving the accounts of the executors being unappealed from, and the distribution and payments in accordance therewith are a bar to the prosecution of this suit.

III. The releases and discharges given by these plaintiffs are a bar to the prosecution of this suit.

IV. The *laches* of the plaintiffs are a bar to its prosecution.

V. If all of these questions should be decided against us, then we contend that the construction of the will made by the Supreme Court of Errors of the State of Connecticut was the correct one.

I.

We submit that the judgment in the suit of James B. Colt in the Hartford Superior Court, is conclusive upon these plaintiffs as to the construction of the will and the distribution of the residuary stock.

No question is made by the plaintiffs as to the jurisdiction of the court in that case over the subject matter or the parties thereto. All these plaintiffs were made parties and were personally served with the process, and they were in fact represented by able counsel throughout the whole case.

Nor is it necessary to consider the general question as to the effect and conclusiveness of a judgment between the parties thereto upon the questions therein decided. It would be easy to fill a book with authorities on that subject, but the court is familiar with the rule, and the plaintiffs do not question its general application. They admit that that judgment would be a bar, were it not for certain reasons set up in their bill on pages 31 and 32 of the Record, which are in substance as follows:

1. That some of these plaintiffs were minors, and that no guardian *ad litem* was appointed to represent them in that case, that their general guardian had no power to represent them, and in fact did not appear in the case.

2. That the rights of said minors *could not* be passed upon until the youngest became of age.

3. That the executors were not made parties "in their capacity as trustees" and did not appear or act for the minors in such capacity.

4. That if they were considered to be parties to the proceeding, they opposed the claims of these plaintiffs.

5. That Mrs. Colt as guardian did not employ counsel or appear, nor did Mrs. DeWolf, but supposed the executors acted for them.

We submit that none of these claims are effectual either in law or in fact.

1. As to guardian *ad litem*.

a. The first decree in the James B. Colt suit, page 54 of the Record, finds that "the said minors were *duly* represented by their guardian," and a similar decree is found on page 61. This record of the court imports absolute verity, and until set aside is conclusive on all facts found by it.

This judgment has the same effect in this court that it would have in a similar proceeding brought in the State court.

The judgment of a State court is regarded by the United States Court for that district as a domestic judgment.

Owens *vs.* Gotzian, 4 Dillon, 436.
Dupasseur *vs.* Rochereau, 21 Wall., 130.

In the courts of Connecticut it is well settled that a finding of a fact by the Superior Court, whether jurisdictional or not, cannot be questioned collaterally, but only by some direct proceeding to reverse the judgment.

The precise point arose in the case of Coit *vs.* Haven, 30 Conn., 190, in 1861. It was fully argued and a very full opinion given referring to former cases, and it was held,

not only that a finding of the Superior Court even as to a jurisdictional fact, could not be attacked collaterally and was conclusive until reversed, but that where the question was whether the defendant had ever been served with process, and the only finding on the subject was, "This action came to the present term of this court," that this was conclusive, and the defendant could not be permitted to show that he was not served, because, the court said, the cause could not have come to the term of court, unless it had been properly served.

So if the rule applicable in Connecticut courts be applied here, it is clear that no evidence could be admitted to disprove the finding of the court.

It was formerly held in the courts of the United States that no averment of the record even as to jurisdictional facts could be controverted, but in Thompson *vs* Whitman, 18 Wallace, 457, on page 468, it was held that as to jurisdictional facts evidence was admissible to attack the findings of the record.

In that case, however, as well as in the cases there cited, it was held that as to findings on any other than jurisdictional facts, the averments of the record were conclusive, in all courts, and could not be shown to be untrue.

In Christmas *vs.* Russell, 5 Wall., 290, the court says on p. 302:

"Where the jurisdiction has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits."

See Sargeant *vs.* State Bank, 12 How., 371.
Grignon's Lessee *vs.* Astor, 2 How., 319.
Cocke *vs.* Halsey, 16 Peters, 71.
Parker *vs.* Kane, 22 How., 1.

This question of the appointment of a guardian *ad litem*, is not in any respect a jurisdictional question. The court

clearly had jurisdiction of the cause and of the parties, and a claim that evidence is admissible to contradict a record that minors were *duly* represented by their guardian is without precedent, and contrary to all the decisions.

b. There is no evidence introduced to show that no guardian *ad litem* was appointed; this is a distinct allegation of fact denied in the answer, and should have been proved.

c. According to the practice in the State courts of Connecticut, where the general guardian is cited in, it is not necessary to appoint a guardian *ad litem*.

Reeves on Domestic Relations, a Connecticut author, says on page 267:

"If the minor who is sued have a guardian, he must be notified. In such case when the guardian is not notified when the writ issues, the suit will not abate; but a summons will issue from the court, notifying him of the suit. If the infant have a guardian before the commencement of the suit, the court may appoint a guardian *ad litem, provided the guardian is out of the reach of the process of the court.*"

This shows that if the minor has a guardian who is or can be cited in, the appointment of a special guardian *ad litem* is improper.

Swift's System of the laws of Connecticut, which is regarded as of the highest authority as to practice here, says on this subject, Vol. I, p. 217:

"Minors, on account of their youth and inexperience, are deemed incapable to prosecute and defend in suits. The law therefore to protect them from any injury in this respect, has made it necessary that they sue by guardian, or if they have none, then by the next friend. The parent is called the natural guardian. They cannot be sued only under the protection of, and by joining the guardian, parent, or master, in the suit; if they have none, they may be sued without, but the plaintiff must inform the court, whose duty it will *then* be to appoint a guardian, for the purpose of assisting them in their defense."

Swift's Digest of the laws of Connecticut, also of the highest authority, says the same on Vol. I, p. 61:

"An infant must always defend by guardian, and cannot by attorney or next friend. When an infant is sued, the plaintiff should give notice to the guardian, if he has any; but the suit may be brought without. The court may order the guardian to be cited in, *or may appoint a guardian ad litem.*"

In Wilford *vs.* Grant, Kirby, p. 114, such appears to have been held to be the proper practice, to cite in the father as natural guardian.

Where it is the proper practice to cite in the guardian, of course it would be unnecessary and improper to have a special guardian *ad litem* appointed also. Both of them could not have power to manage the suit. It may be that in other states and countries the practice may be different, and instead of citing in the regular guardian a special guardian *ad litem* is appointed for each suit.

It would seem as if our system were the best, as the regular guardian would know most about the affairs of the minor, is obliged to give bonds, is answerable to the Probate Court, etc.; but it is unnecessary to discuss that question.

It is enough that in this case the usual and proper practice in the state where the suit was brought, and all the parties resided, was followed.

But the general rule is the same elsewhere. Bingham on Infancy, page 123, note, says that an actual defense by the general guardian is enough, though no special guardian *ad litem* be appointed, citing,

Brown *vs.* McRae's Exrs., 4 Munf. Va., 439.
Priest *vs.* Hamilton, 2 Tyler, 44.
Mercer *vs.* Watson, 1 Watts, 330.
Cato *vs.* Easley, 2 Stew., (Ala.) 214.

Schouler on Domestic Relations, 2d ed., p. 596, says:

"If there be a general chancery, probate, or testamentary guardian, already appointed, it is his place to defend the infant from all suits."

And on p. 598, as to the rule in Chancery, he says:

"In the appointment of guardians *ad litem*, Courts of Chancery will exercise a liberal discretion; in all proceedings of this character the appointment of a guardian *ad litem* to appear in behalf of infants interested in the proceedings is regarded as proper, and even necessary *where* they have no general guardian."

In Swan *vs.* Horton, 14 Gray, 179, the court says:

"But an infant cannot, in a civil suit, be properly defaulted, or have a judgment rendered against him for any cause of action, without having a legally-appointed guardian, who may defend the suit in his behalf. *If he has none under a probate appointment*, or other authorized source, a guardian *ad litem* must be appointed."

In O'Hara *vs.* McConnell, 3 Otto, 152, the Supreme Court says:

"If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was the more imperative that the court should have appointed some one to do it. There is no evidence in the record, except the statement in the bill, that Dr. Barr was her guardian. If he was not, *then there was no one served with notice, whose legal duty it was to defend her.*"

d. Even if the rule were otherwise, it is well settled that even if a special guardian *ad litem* should have been appointed, but was not, the proceedings are not *void*, but merely erroneous. The judgment exists, and is conclusive until properly set aside, reversed, or vacated in due form of law.

Swift's System, Vol. I, p. 218:

"If judgment be rendered against a minor, no guardian *being cited* or appointed by the court, on default, writ of error will lie for the error in fact, and the judgment be reversed."

So Swift's Digest, Vol. I, p. 61:

"If a judgment should be rendered against an infant, no guardian *being cited*, or appointed by the court, it will be error."

In Fahay *vs.* State, 25 Conn., p. 206, in a proceeding before a justice against a minor, where no guardian *ad litem* was appointed, a judgment was rendered against him. He appealed to the Superior Court, and then plead in abatement that the proceedings before the justice were void because no guardian *ad litem* was appointed, but the court say:

"The omission of the justice to make the appointment was undoubtedly an error, rendering his judgment liable to be set aside upon a writ of error, but affords no ground for dismissing the complaint and setting the accused at liberty."

In State *vs.* James, 37 Conn., 355, a judgment in a criminal case in the Superior Court was rendered against a minor without any such appointment, and the court says:

"He says, first, that he was a minor, and that no guardian appeared for him or was appointed in the proceedings under which he was imprisoned. If this be so, the proceedings may be erroneous, *but are not void.*"

Reeves on Domestic Relations, 268, says:

"In Connecticut it has been determined that if an infant has a guardian, and he is summoned and does not appear, it is not even error."

This being the rule in Connecticut upon the effect of the validity of a judgment in its courts, it is binding upon all other courts.

But it is also the rule elsewhere.

Austin *vs.* Seminary, 8 Metcalf, 203, was a case where a judgment in partition had been rendered against an infant without the appointment of a guardian *ad litem*, and in

another action on a writ of entry brought by the infant this judgment was set up as conclusive. The infant, as in this case, claimed that the judgment was void because no guardian *ad litem* had been appointed, and his claim had the more force because in an action of partition in Massachusetts a writ of error did not lie, and his only method of defense was to allege the nullity of the judgment. But the court held that the judgment was not void, but only erroneous, and it was held to be conclusive. This case is directly in point.

"When the proceedings are at common law, and an infant appears by attorney instead of guardian, or, after being served with process, suffers a default, the judgment will be erroneous—not void."

Bloom *vs.* Burdick, 1 Hill, 130 (p. 143).

Porter *vs.* Robinson, 3 A. K. Marshall (Ky.), 253, holds that a decree in chancery made against infant heirs where no guardian *ad litem* was appointed was not void, but only erroneous, and was conclusive until reversed, like any other judgment.

Townsend *vs.* Cox, 45 Mo., 401.
Barber *vs.* Graves, 18 Vt., 290.
Drake *vs.* Henslaw, 47 Iowa, p—.
White *vs.* Marshall, 3 Dev., 241.
Simmons *vs.* Simmons, 6 Ind., 8.

All the authorities hold that the want of such appointment is error.

See O'Hara *vs.* McConnell, 4 Otto, p. 152.
Bingham on Infancy, 123, cases cited in note.

It needs no authority to show that a judgment merely erroneous is not void, but is conclusive until reversed.

Harvey *vs.* Tyler, 2 Wall., 341.
Thompson *vs.* Tolmie, 2 Peters, 163.

It is true that there are judgments which have been held void because no guardian *ad litem* was appointed, such as Bloom *vs.* Burdick, 1 Hill, 130; Smith *vs.* Rice, 11 Mass., 507; Proctor *vs.* Newhall, 17 Mass., 91, and others; but those were cases before courts of limited jurisdiction where a statute provided that if infants were parties, a guardian *ad litem* should be appointed, and the courts held that until this was done the court had no jurisdiction whatever of the infant.

There is no doubt but that a decree of a court of chancery, until reversed, is conclusive on an infant party. 1 Daniels' Ch. Practice, p. 164, says:

"An infant defendant is as much bound by a decree in equity as a person of full age."

Nor is there any question but that in Connecticut a writ of error will lie in any proceedings in equity. If there was anything erroneous in the judgment in the James B. Colt case, the defendants could have had it reversed, and by statute any infant party can bring a writ of error after he becomes of age.

The judgment, therefore, is not void for want of appointment of a guardian *ad litem*.

2. The second claim is that the rights of those of these plaintiffs who were minors, *could not* be adjudicated until the youngest became twenty-one.

This is clearly a matter for the State Court to pass upon. Where a court has jurisdiction of the parties and gives judgment against them, their decision is final upon all the questions which arose or could have arisen in that case.

It would be a strong doctrine if parties could make one of two defenses in a case, and then attack the judgment collaterally by endeavoring to prove that they had another defense which they might have made but did not.

But there is no foundation for the claim. It was necessary for the settlement of the estate that the amount of the residuum, and the persons entitled to it, should be determined, either by the court of probate or by some other proper court.

Infants are as liable to be sued and to have their rights decided by a court as any other persons. All their rights in the stock were vested at the death of the testator, and there were no springing uses, conditions or contingencies whereby rights of other parties not then in being might arise. All the children of Christopher Colt were then and are now in being, and there was no reason why their rights should not have then been settled as well as those of any other legatees.

3. Because the executors were not made parties to the suit both as executors, *and also in terms* as trustees for the children of Christopher Colt the plaintiffs.

The statement in the bill of this ground of objection is as follows Record, p. 10.:

"Because the said Elizabeth Hart Colt, and Richard D. Hubbard and Richard W. H. Jarvis, trustees, as aforesaid, under said will and codicils of the said children of Christoper Colt, were not summoned to appear in said proceedings in their capacity as said trustees, and, as your orators aver, entered no appearance in said proceedings, in their capacity as said trustees, in behalf of said children, and employed no counsel to appear before said court in their behalf as trustee for said children and in defence and maintenance of the rights of said children under said residuary clause in said will in respect of said gift of five hundred shares of said stock to said trustees as aforesaid; and no issues were made up or caused to be made up by said trustee, before said courts in said proceedings involving the rights and interests of said children under said will and codicil to said residuary stock in respect of said gift to said trustees, as hereinbefore claimed."

This is an objection of the most extremely technical character. It is not claimed that the executors were not made parties to the bill, that they were not served with process, or that

they did not appear, all this is admitted; but the plaintiffs gravely set up as a reason, and the principal reason why they should not be affected by the judgment, that the citation did in terms speak of these executors both as executors and trustees; and this, although the plaintiffs themselves were made parties, appeared, and were themselves fully represented by able and competent counsel.

Such an unreasonably and unjust technical claim as this, made for the first time thirteen years after the trial of the case and after the division of the estate based on that decision deserves to be met by a claim as technical as itself, viz.: That the devise in question was not a devise to trustees at all. It was as follows—page 63 of record:

"I give to the eldest son of my brother Christopher Colt a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are canceled and revoked; and I hereby give, bequeath, and devise *to the other children* of my said brother (said eldest son not being included herein), the property, to wit, five hundred shares of the stock of the Colt's Patent Fire Arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, *to have and to hold* to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed *is to be held by my executors* for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt."

The testator devises the stock *to the children of Christopher Colt, to have and to hold the same in equal proportions*, and he then says that *his executors* are to hold it until the youngest child is twenty-one. He does not devise the stock to his executors *as trustees* in terms, but merely says that his *executors* are to hold it for a certain time. Of course they hold it in trust; all executors are trustees in that they hold the property of the intestate, not for themselves but for the benefit of others, but these executors were not *technically*

trustees of this stock any more than of any other stock belonging to the deceased testator.

All the stock of the deceased vested in the executors in trust for some one, and the fact that the testator directed them to *hold* this stock until a certain time, made them no more trustees in a technical sense than they would have been without.

They held this stock as executors when James B. Colt brought his suit, they were made parties as executors, and as such they appeared in the case and employed counsel as able as the United States could produce, Benjamin R. Curtis, to protect the rights of all the persons whose interests they represented.

Now to say that the decision in that case was of no avail because the citation did not speak of them as trustees in addition to naming them as executors is puerile and even on principles of pure technics is not sustainable.

But the claim of the plaintiffs has no merits in it in a proceeding in equity.

This Court is seriously asked as a Court of Equity, to break up and destroy a settlement of a great estate made in 1866, after a decision of the highest court of the State in a suit to which these plaintiffs were parties, where they were represented by counsel and their claims in fact fully presented, where they acquiesced in that decision and received their share of the property in accordance with it, now we say it is seriously asked to retry and rearrange the whole settlement of that estate, and make these defendants who eighteen years ago, distributed the property to those entitled to it, now pay hundreds of thousands of dollars out of their own pockets to these plaintiffs.

A more inequitable and unrighteous claim never was presented in a court of justice.

The claims of the plaintiffs seem to be founded upon a theory that as to the stock and dividends which they now claim, there were no persons representing it made parties to the suit of James B. Colt, and the rights and claims of these plaintiffs were not properly presented or considered, but were sacrificed, and as they insinuate intentionally so by the executors, to further their own personal and individual interests.

Nothing can be further from the truth than this claim.

The sole object of that suit was to obtain a construction of the residuary clause in Samuel Colt's will, and to have decided whether it applied only to persons who had been *theretofore* mentioned in the will, or whether it also included those who were mentioned in the codicils.

If the former view was adopted then Judge Colt took under the residuary clause, by virtue of the primary bequest to him. His children took nothing under the residuary clause by virtue of the bequest to them because the second codicil said in terms, "I hereby cancel and revoke *any and all* other legacies or devises by me heretofore at any time made to or for the use and benefit of said children or any of them." The children of Christopher also on this construction took no interest under the residuary clause in respect to the five hundred shares given to them under the second codicil, because they were not persons to whom legacies of stock had been *theretofore* given.

On the other hand, if the construction claimed by J. B. Colt was not adopted by the court, then he would take nothing under the residuary clause, and the children of Christopher would. The whole interest of J. B. Colt, and of the children of Christopher as to residuary stock were adverse, and the success of either was fatal to the claims of the other.

In fact the claims of J. B. Colt were adverse, not only to the executors and to the children of Christopher, but also to every other legatee of stock under the will.

This was so clear that it was known and understood by every one. It was for this reason that when Mr. Hubbard learned that Mrs. Theodora Colt, for herself and children, was not going to join in the trial of the demurrer against J. B. Colt, he went to her and to Mr. Robinson as her counsel, and urged on both that a decision in favor of J. B. Colt would be very prejudicial to the interests of her children (pp. 109 and 110 of Record), and why Mr. Robinson (p. 102 of Record) urged the same view upon Edward Colt.

It also accounts for Mrs. Theodora Colt and Edward's conduct. They knew that the executors would oppose the claim of J. B. Colt, that all that money and talent could do would be done against his claim, and consequently in favor of theirs, and that their interests and those of the executors were identical. That being so, they did not care to take any special side in the matter and appear to be actively engaged against J. B. Colt.

Under these circumstances the executors, these defendants, both for themselves and all the other legatees, made every possible exertion to protect the interests of these plaintiffs as well as of all the other legatees. Certainly no fault can be found with them either in the counsel they employed, or in the manner in which the interests and claims of the defendants in that case were presented by those counsel. The case was fully presented to the court, and after mature deliberation in a well-considered opinion the construction of the residuary clause claimed by the counsel for Judge Colt was adopted, and it was held that the expression *hereinbefore* did not mean *hereinafter*.

This was fatal to the claims of these plaintiffs as well as to those of all the other legatees so far as the construction

of the residuary clause was concerned, and all that was left in the case was to apply this principle so settled, to the various legatees, and ascertain the exact figures of the interests of each.

At this point these plaintiffs presented a claim which was adverse to all the other legatees, that although this principle of construction was applicable to J. B. Colt's claim, it was not applicable to them, and for the first time the interests of these plaintiffs interfered with and antagonized with those of the other legatees.

The position of the executors therefore became peculiar; they represented persons whose interests were opposed to each other, and might be placed in an equivocal position. For this reason Gov. Hubbard went a second time to Mrs. Theodora Colt (see Record, p. 110), explained the situation to her, and asked her what course she desired the executors to take, and she informed him that she preferred to have their own counsel to protect their interests. This solved the difficulty under which the executors were laboring, and their counsel confined themselves to applying the principles already laid down by the court. Mr. Robinson did all that man could do, citing the very authorities on which the plaintiffs now principally rely, but it was from the first a hopeless task. It was virtually asking the court to stultify themselves, and reverse the decision which they had made the year before.

The only evidence offered to contradict this positive testimony of Mr. Robinson and Gov. Hubbard is that of Mrs. Theodora Colt, who inferentially denies it, saying that for the reasons she gives on p. 167 of the record, she could not have said what he states. The court we think will believe that Mrs. Colt has forgotten, rather than that Mr. Robinson and Gov. Hubbard, who swear positively, are mistaken.

This statement of the facts leaves nothing in the plaintiff's case so far as any equitable claim can be made.

Nor is there any more foundation for the technical part of their claim. They say that the judgment in the J. B. Colt case is not binding upon them because it was not between the same parties, and the questions at issue were not the same as those raised in this case.

Their claim as we understand it is that the 500 shares given to them by the second codicil, and in respect to which they claimed an interest in the residuum, was given to the executors not as executors, but as *trustees*; that they held the legal title to these shares not as executors but as trustees, that they were not made parties distinctively as trustees as well as executors. That the present suit is between the plaintiffs and the defendants as trustees, and not as executors, and therefore between different parties.

In the first place this bill is not brought against Colt, Hubbard, and Jarvis as *trustees* to make them account and pay damages for a breach of their trust. It was so brought originally, but we demurred to it on the ground that the bill prevented two causes of action, one against the executors as such, and the other against Colt, Hubbard, and Jarvis as trustees, and the court sustained our demurrer on that ground, and the plaintiffs then so amended their bill as to confine it to a claim against the executors as such (Record, pp. 18 to 23).

In the second place, moreover, the devise was not to the executors *as trustees*, but to the executors *as executors*. This appears clearly by the original devise in the will of these 500 shares for the benefit of the children of James B. Colt, which are the same shares as those given by the second codicil to these plaintiffs, and which that codicil says his executors are to hold in the same manner as the devise in the will. Now that devise (Record, p. 56) was not to the persons who were executors, *as trustees*, but was "to my executors *and their successors in said office*," making the trust appurtenant to *the*

office of executor, and not to any persons in particular. The trust therefore being in the executors *as such*, it was only necessary to make them parties to the suit against J. B. Colt as executors, and being in court, they were there in regard to everything which they held *as executors* for any purpose.

It must be remembered also that this bill of J. B. Colt was brought for the very purpose of having the respective interests of *all* the persons interested under the will adjudicated and settled, and it was impossible for any division to be made unless all persons interested were made parties. These plaintiffs were made parties, and properly cited in. They and their guardian knew of the proceedings, and knew or might have known of everything that was done in the case. Their claims were duly presented and passed upon by the court without any objection, or any intimation by them that there was such a want of parties to the proceeding, that the whole proceedings would be void not only as to them, but also as to every one else, for the decision was based upon the interests of all parties, and a change in the rights of one, necessarily altered the rights of every other. It was the duty of these plaintiffs if there was a defect of parties, especially such a bare technical defect as the one suggested, to have brought it to the attention of the court. Their not doing so, but on the contrary assenting to the decision, allowing the stock and money to be distributed, and receiving their own share, makes their present claim very nigh a fraud, and is certainly ground for an estoppel against them from now setting it up, and endeavoring to make these executors who have parted with the property now claimed, to others, in reliance on that decision now pay over the same property again to these plaintiffs.

The authorities cited by the plaintiffs on this point may be very good law, but they have no bearing on a case like the present. No doubt there is a difference between the duties of executors as such, and those of trustees as such, and the

same persons may act in both capacities and have different duties and obligations annexed to each office, but we have yet to see any authority cited where a court has held upon facts like those in this case, that such proceedings had no binding force, because the parties were not spoken of as both executors and trustees.

Counsel for the plaintiffs actually claimed in their brief below, that the Supreme Court of Errors in that case did not pass upon the same question as that which arises here, because they say that the *children* of Christopher Colt take no share in the residuum on account of the legacy to them in the codicil and did not say "*the trustees* of the children." Truly the force of technics can no further go.

4. The plaintiffs however, further claim that if the judgment in the J. B. Colt case would otherwise be conclusive against them, yet that the conduct of the executors in opposing their claims was either constructively fraudulent, or else there was such a mistake or misapprehension about it, as to in some way affect the conclusiveness of the judgment.

But if this were true it would not alter the *effect* of the judgment when pleaded as a defense. At the most it would only be ground for a new trial or re-argument of the case, and it is well settled that such a proceeding must be had in the court where the judgment was given. This court could not entertain a bill for the purpose of reversing that judgment or deciding that the reasons given in it were not sufficient.

Barrow *vs.* Hunton, 99 U. S, 80, p. 83.

Nor is this petition framed for any such purpose. It does not ask that the judgment in the J. B. Colt case should be opened or a new trial granted, or that judgment be reversed or set aside. This question only arises here as one of evidence, of the *effect* of the decree as it stands, and it is unnecessary to cite authorities to show that the conclusive-

ness of a judgment when passed cannot be attached by evidence that the questions relating to the interests of one party or another were not fully argued, or that one of the parties to it did not do his duty as trustee or otherwise.

So long as that judgment stands it is conclusive between the parties to it upon every issue decided by it, whether it was properly tried or not.

But as matter of fact, this claim of the plaintiffs is entirely without merit upon the evidence.

The real contest as to the meaning of the residuary clause was upon the demurrer. After the Supreme court of Errors had decided that in that clause "hereinbefore," did not mean "hereafter," and that only the persons to whom stock had been given by the will could share in the residuum, it was absurd to suppose that it would stultify itself in a further hearing of the same case, and decide directly the reverse. The rights of these plaintiffs were as much disposed of and settled by that first decision as if they had been plaintiffs.

The interests of the executors as individuals, and of all the defendants, including these plaintiffs, were identical and there can be no pretence that the executors did not take every possible precaution to protect the rights of these plaintiffs as well as all the other defendants. These plaintiffs on the other hand, though urged both by the Executors and by their own counsel to join in endeavoring to defeat the claims of J. B. Colt, preferred to remain neutral, and take no part in the controversy.

They do not however, find any fault with the conduct of the executors in the hearing upon the demurrer, but say that upon the final hearing when the question came up directly whether *they* were interested in the residuum, the executors did not act for them but opposed their claim, and they intimate that this conduct was fraudulent, and was induced

by a desire on the part of the executors to increase their individual interests in the residuum.

This claim comes with a very bad grace from them, in view of the fact that Mr. Hubbard made a special explanation of the then condition of the case to Mrs. Theodora Colt, the mother and legal guardian of these plaintiffs, and now a party to this suit, as owning the interest of Edward D. Colt the oldest son who was interested, and asked her whether she wished the executors to represent the interests of her children, and that she expressed distrust of them and a desire that her own counsel should appear and present her claims.

Surely this was a sufficient reason why the executors should make no special efforts on behalf of these plaintiffs, when they were requested not to, and found at the argument other competent counsel who took that part of the case out of their hands.

But even then, as Mr. Hubbard testifies, (Record, p. 111,) he "took the trouble to have friendly consultations with Mr. Robinson in respect to the case, and made such suggestions as occurred to me as a lawyer in aid of his points." If this was not doing the whole duty, and more than the whole duty of a trustee, in view of the rebuff he had received, we cannot conceive what would be.

The suggestion that Gov. Hubbard the acting executor, and who had the management of the suit, intentionally neglected his duty to these plaintiffs, and sought a decision against them, because it would add five shares of stock to his portion, is beneath notice.

The executors moreover had some duties to perform as to the other persons interested in the estate besides these plaintiffs. They represented all the other legatees of stock except J. B. Colt, and they were only bound to see that all the questions in the case were properly and fairly presented to the

court. This they did, as to this part of the case by employing besides Mr. McFarland the Hon. Origen S. Seymour, then one of the ablest lawyers in the State, and since the Chief Justice of the Supreme Court of Errors, and left it to these counsel to present such views on the questions of law as seemed to them well founded. They took but little part in the discussion of the question of the rights of Christopher's children citing only one authority. The burden of that part of the case against the claim of these plaintiffs being taken by Charles Chapman and Thomas C. Perkins, as is stated by Mr. Robinson, (Record p. 103), and shown by the minutes of the reporter, Mr. Hooker, (p. 159 Record), and Mr. Robinson being fully heard in favor of these plaintiffs.

There can be no pretence that the claims of these plaintiffs in that case were not fully and ably discussed by counsel, and understood and passed upon by the court. The result must have been the same whether the counsel for the executors took one side or the other.

5. Lastly the plaintiffs claim in their bill (p. 32 Record), that Mrs. Theodora Colt as guardian of the minors, and Isabella Colt DeWolf who was of age, were unacquainted with business, and did not suppose it was necessary to appear in the case, or employ counsel, and did not appear or employ counsel.

This claim, if true, would not affect the conslusiveness of the judgment. At the most it would be only ground for an application for a new trial, or a re-argument. Even then, where all the parties were regularly served with process, and where in fact counsel appeared for them and were fully heard, no court would open the case or allow a new trial for such reasons.

But it is too clear to need argument or authorities to show that a judgment cannot be attached collatterally upon such ground.

Nor is it true that they did not appear, and had no counsel. Both findings of the Superior Court (pps. 66–70 of the record) expressly find that "the parties appeared by counsel, and the minors were duly represented by their guardians," and these records impart absolute verity, and as has already been shown cannot be impeached or contradicted by evidence.

As a matter of fact also, it is not denied that Mr. Robinson *did appear* for these plaintiffs, and acted as their counsel and adviser, not only in the Superior and Supreme Courts, but in all their business of every kind connected with their interests in this estate, down to the final settlement in 1873. It is not suggested that he was incompetent, or that a hundred lawyers could have done any more to protect their interests, or affect the decision of the court, than he did.

The plaintiffs admit all this, but rest their claim upon the fine distinction that he was employed by Edward D. Colt only for himself, and not by Mrs. Theodora Colt as guardian of all the minors. Edward unfortunately is dead, and substantially the only testimony to sustain the plaintiffs claim on this point is that of Mrs. Theodora Colt herself, who is now personally interested as the owner of Edward's interest. She denies entirely having ever employed Mr. Robinson or authorized his employment, though she knew that he appeared both in the Superior and Supreme Court on behalf of her children, and "made some few remarks!" She also (on p. 164 of record) tells the absurd and incredible story that Mr. Robinson applied to her to be retained for her as counsel, which shows, to say the least, how little reliance can be placed in her testimony.

She is directly contradicted by Gov. Hubbard, and also by Mr. Robinson himself, who is entirely disinterested in this case, and whose positive and clear testimony is so fully corroborated by the other evidence, and the acknowledged facts in the case, that we do not deem it necessary to go over it at length, the more especially as, whether he was technically

retained for all the minors or not. He did in fact appear and did all that any one could have done for them.

We submit that none of the reasons urged by these plaintiffs present any grounds either legal, equitable, or moral, why this court should not regard the judgment in the case of J. B. Colt against these plaintiffs as conclusive upon all the questions which were considered and decided in it. We could with perfect safety rest our defense on this judgment alone.

II.

But this is by no means all the defense we have.

The proceedings of the Court of Probate are just as decisive and conclusive as those of the Superior Court.

After the cases of Colt *vs.* Colt and Colt *vs.* Hubbard were decided in the Court of Errors in 1866, it was considered that all questions relating to the legacies and the legatees had been settled by the highest authority, and the executors proceeded to settle the estate in conformity with the opinions in those cases.

They transferred the bequeathed stock and paid over the back dividends to those entitled to them, so far as the will directed, both primary and residuary, and a distribution was made, and the account of the executors showing all these proceedings was duly made and accepted by the Probate Court. No appeal has ever been taken from these decrees, and according to the decisions in Connecticut these decrees and distributions bind all the parties thereto as fully as judgments or decrees of the Superior Court.

In Judson *vs.* Lake, 3 Day, 318, the court says:

"The decisions of those courts, while they stand unreversed, are as conclusive as the decisions of any other courts of record on matters within their jurisdiction."

In Dickinson *vs.* Hays, 31 Conn., 422, the court says:

"Our courts of probate have exclusive jurisdiction of the probate of wills and of the settlement of estates, and their judgments and decrees in relation to real estate stand upon the same footing, and are of the same force, as in regard to personal property. Their judgments in matters within their jurisdiction operate upon the subject matter of adjudication, and *conclude all persons interested therein*, upon the same principles and to the same extent as the judgments of our common law courts."

That the rights of heirs, devisees, etc., are to be settled by the account of the executor is also clear.

Potwine's Appeal, 31 Conn., 382, speaking of the decree settling an administrator's account, says:

"That decree has all the elements of a final judgment. *It determines conclusively*, unless appealed from, the rights of the administrator or executor in respect to his charges and disbursements, and those of the heirs and legatees in respect to his receipts and the performance of his duties; and it fixes the basis of a sale of the estate, so far as required to pay debts, *and for a final distribution* of the surplus.

In Edmunds *vs.* Canfield, 8 Conn., 87, p. 90, the court says:

"Such an administration account sanctioned by the decision of the court, is necessarily precedent to the distribution of the deceased's estate. Every item in every administration account, must be examined and adjudicated upon, by the court of probate: nor is this matter of form, but of substance; otherwise, the records of the court, *which ought to be of incontrovertible verity*, would afford no evidence of the just and legal settlement of an estate."

Goodrich *vs.* Thompson, 4 Day, 215.
Atwater *vs.* Barnes, 21 Conn., 244.
Sellew's Appeal, 36 Conn., 193.
Brush *vs.* Button, 36 Conn., 294.
Bulkeley *vs.* Andrews, 39 Conn., 523.

The same rule applies to a distribution. It is conclusive unless appealed from, both as to who are to take and what they are to have.

Gates *vs.* Treat, 17 Conn., 388.
Kellogg *vs.* Johnson, 38 Conn., 269.

Probably these views will not be controverted, but it will be claimed that these plaintiffs should not be bound by these decrees because they had no notice of them, as is set up in their bill. But the fact is not so.

In the first place, they had notice by advertising and posting.

The statutes of this State on that subject in force in 1866 was the revision of 1866, *not the present one*. That revision went into force January 1, 1866, and all the proceedings in the probate court were after that date.

The statute is found on p. 409 of the revision of 1866, and is as follows:

SEC. 36. Whenever an executor or administrator shall exhibit his administration account to the court of probate for allowance, or whenever said court shall have appointed a time and place for hearing the account of an executor or administrator, said court shall direct such executor or administrator to cite all persons interested therein, to appear at such time and place as said court shall have appointed, *either by publishing some notice thereof in some newspaper, or otherwise*, as said court shall judge proper."

In the case in question the court ordered the notice to be published in a newspaper, and posted on the sign-post. The court finds in each case that this was done, and Mr. Hubbard also testifies that it was so done as ordered.

The finding of the court on the subject is conclusive.

In Segee *vs.* Thomas, 3 Blatch., 11, on p. 21, the court says:

"Courts of probate are courts of record. Full faith and credit are due to their official acts, when regular on the face of them. As much faith and credit are due to them, so long as they remain unreversed, not appealed from and not set aside, as are due to the official acts of other courts of record. The order of the court of probate authorizing the sale of the land in question finds, that notice in conformity with the order of the 31st of October, 1826, had been given. The record, then, of a competent court, acting within its legitimate powers, has declared that notice in pursuance of the order was given. That record must be considered as speaking the truth, and as conclusive, if it is not void on its face, until it has been reversed, or in some way set aside, or vacated, or appealed from. And there is no claim that it ever was appealed from, or in any way vacated or set aside."

Moreover, it appears in evidence that Mr. Robinson, counsel for these minors, was consulted all through the settlement of the estate, was present at the Court of Probate at the hearing (as appears also of record), and also that special notice by letters was given to the parties themselves, and as to the last account it was settled after the minors had become of age and when they were personally present with their counsel, and also that after each settlement the plaintiffs or their guardian received the amounts due to them under such settlements, and signed receipts referring to the respective settlements of the accounts, showing their knowledge.

It appears therefore that after the rights of the parties to this bill had been settled by the decisions of the Court of Errors of this State, the property which they now claim was delivered over to the persons entitled to it under and in accordance with the orders of the court, and the accounts and distribution showing such delivery, were approved of and accepted by the proper decrees of the Court of Probate, and the whole estate finally settled after both legal and actual notice to these plaintiffs and their presence either personally or by counsel.

If under these circumstances years afterwards the whole settlement of the estate can be re opened by a bill in this court, the rights of the parties again tried and decided, and the executors held personally responsible for whatever different judges may decide ought to have been done, the whole system of settlement of estates in this State is destroyed.

It requires no argument to show that what the petitioners ask would destroy the effect of all the proceedings in the Court of Probate. They claim a share in all the dividends paid to James B. Colt, an entire re distribution of the residuum of stock and a conveyance and payment to them of large amounts of stock, and dividends which were conveyed and paid to other parties as long ago as 1866, and that these executors respond to these claims.

III.

But in addition to all this the plaintiffs, after all of them had become of age, gave full and absolute discharges and releases under seal, covering in terms as full and absolute as could be devised, all claims they had against these executors, both as executors and as trustees under the will of Samuel Colt.

The effect of such discharges is clearly to bar their claim unless they can be set aside by this court for fraud, accident, or mistake.

There are two discharges which may be governed by different rules—one to the executors as such, discharging all claims against the estate, and others to the same persons as trustees releasing them from all claims under the trust.

We do not understand that under the bill as now framed by amendment, since the decision of this court on demurrer, the plaintiffs claim to recover of the trustees *as such* for a

breach of trust or neglect of their duty. Nor do we understand that any claim is made that the trustees as such have not fully accounted for all the trust property which came into their hands as trustees, so that the effect of the releases to them as trustees does not arise—we will only speak, therefore, of the release to the executors, although what is said will apply as well to the others.

There is no claim of accident or fraud, and the only ground on which the plaintiffs rely is mistake, combined with their confidence in the executors.

Without going into an extended examination of the law on this subject, which is stated in Story's Equity, vol. 2, chap. 5, p. 103, *et seq.*, the facts in the case as testified to by Mr. Robinson the plaintiff's counsel, and Mr. Hubbard, show clearly that the discharge to the executors was drawn with full knowledge on the part of these plaintiffs and their counsel of the decision of the Court of Errors and the settlements of the Court of Probate, and with a full acquiescence on their part in the settlement founded on those decisions. These plaintiffs had their counsel with them, who had been concerned in these litigations and acted for these plaintiffs from the beginning. He and they well knew that it had been claimed that these plaintiffs were entitled to this residuary stock now in question, that the question had been decided against them after a full and fair hearing, that the estate had been settled on that basis, and the moneys now paid them were paid on the basis so established.

Mr. Hubbard said to them, "There are the accounts, examine them as fully as you wish and then give us a discharge that will finally settle up everything." They understood perfectly well that Mr. Hubbard desired an end of all claims, and wanted a release that would end them. LeBaron Colt was himself a lawyer; Mr. De Wolf was abundantly competent to act for himself. They had Mr. Robinson, who was acting for Mrs. Colt as assignee, and for them.

It is difficult to conceive how they could be better off in the way of advice and assistance.

Does any one believe that Mr. Hubbard for himself and the others, would have, on this 11th day of February, 1873, paid over this sum of over one hundred and twenty-five thousand dollars, and conveyed five hundred shares of stock, if he had supposed they were intending to bring a suit claiming that all the decisions of all the courts fixing that amount were invalid and not binding, and that after they had got this money and stock under those decisions they would repudiate them and claim that Mr. Hubbard and the rest were personally liable for hundreds and thousands of dollars more? It would be little less than fraud if such an intention existed.

The exception of the 574 shares of James B. Colt shows that the matter of how far the release should extend, was fully in the minds of all parties. What was at this time the intent in the minds of these plaintiffs the Almighty alone knows, but that intent can not now be testified to by them, but must be gathered from the words of the release taken in connection with the situation of the parties.

Certainly no case can be found where a court has set aside a full release and discharge in such a case as this.

But it is said the plaintiffs had "confidence" in Mr. Hubbard. Their refusal to allow him to represent their claims in the Court of Errors does not look much like such an overplus of confidence, nor their having Mr. Robinson examine all the accounts and proceedings whenever any were had.

But it is a novel claim that because one party to a release, with his own counsel close by his side, has "confidence" in the counsel of the opposing party, that therefore the release drawn by him is to be set aside for that reason.

This subject is fully treated in Phillips *vs.* Belden, 2 Edw. Ch. Reps., pps., 17 and 18, where it is held that though between attorney and client sometimes accounts and releases will be opened on account of the confidence existing, yet even in such cases it is only where some undue use is made of the confidence, and an unconscientious advantage is taken by the attorney, that it will be done, and in other cases, even in case of a confidential servant or steward, the most unbounded confidence is not any reason for attacking a discharge.

There is no pretence that Mr. Hubbard knew anything in relation to these matters which Mr. Robinson and his clients did not know, or that he concealed anything, or took any unfair or unconscientious advantage of them in any way.

He had always treated them with the utmost care and consideration, had given them notices not required by law, had shown all his accounts beforehand to their counsel, and in every possible way had endeavored to give them and their counsel all the knowledge he had himself, or that he could obtain, that they might fully understand their own affairs; his letters in evidence show this beyond a question.

It is very probable that neither Mr. Hubbard, Mr. Robinson, or these plaintiffs, when these discharges were given, had in their minds any special and particular reference to or remembrance of this particular matter of the residuary stock and the dividends on it now in question.

Ever since 1866 it had been considered both by the plaintiffs, their guardian, their counsel, the executors, and every one else that that matter was settled; all had acquiesced in it, this settlement and release was made in that view, and it is absurd to suppose that these plaintiffs when they gave this discharge intended to exempt this stock from its effect.

It is to be specially remembered also, that this is not a case where a release is set up to defeat a valid and uncon-

tested claim, where trustees are trying to keep property of their *cestius que trust* for themselves.

The only effect of setting aside this release would be to reopen questions settled more than sixteen years ago, and to compel these executors to become personally responsible for property delivered over then to the persons to whom the highest court in the State declared it belonged to.

IV.

And this brings us to the question whether under the circumstances of this case, as shown in the evidence, a Court of Equity will now, at this late day, hold these executors responsible as asked.

The prayer is that they shall account for upwards of five hundred shares of this stock, and for the dividends and accumulations of some eleven hundred shares, amounting, perhaps, to two hundred thousand dollars or more, all of which has long since been paid over to others, part of it to these very plaintiffs under the decrees of the Court of Probate and Supreme Court of Errors of this State.

If they are to be so liable, they are liable personally, for they have nothing in their hands as executors except the 574 shares of the J. B. Colt stock.

The final decree in the Superior Court settling the rights of the parties in the residuary estate was passed in the spring of 1866, and the estate was settled, and the stock and back dividends divided in the summer of 1866.

At that time Isabella and Edward, two of these plaintiffs, were of full age. LeBaron became of age in 1867, and Samuel P. became of age January 10, 1873. This bill was filed

January 5, 1879, within five days of the time when at law the statute of limitations would have barred this claim even as to the youngest of the plaintiffs and about thirteen years after the decision in the case of J. B. Colt.

Now we submit that in a case of much gross *laches* for so long a time, a court of equity will not interfere, set aside all these proceedings, and proceed to retry this case *de nove*, and especially it will not do so where the sole ground of claim is one of the barest technicality.

It is well settled that courts of equity will not interfere where the plaintiffs have been guilty of *laches*, but there is no definite rule as to what constitutes it.

"But a Court of Equity applies the rule of laches according to its own ideas of right and justice. *Every case is governed chiefly by its own circumstances.* Whether the time the negligence has subsisted is sufficient to make it effectual, is a question to be resolved by the sound discretion of the court."

Brown *vs.* Buena Vista, 95 U. S., 157 (160), and numerous cases there cited.

"To let in the defence that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; *in some cases a shorter time is sufficient;* and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

Sullivan *vs.* Portland R. R., 94 U. S., 806 (811).

The case of Hoyt *vs.* Sprague, 103 U. S., 613., though not as strong a case as this, for there no court had passed upon

the questions at issue, is still much in point. On page 636 the court says:

"But aside from the legality and binding effect of the proceedings for investing the minors' interest, as here stated, the acquiescence of the complainants, after they came of age, effectually preclude them from obtaining the relief sought by the respective bills. The bills were not filed until June and July, 1875, in the one case nearly nine years, and in the other more than seven years after the minors became *sui juris*, and could have known, if they did not know, the exact position and history of their property. Notwithstanding all the asseverations to the contrary, the evidence fails to show that they were not allowed every opportunity of which they chose to avail themselves of obtaining this knowledge. And the fact is clearly demonstrated that they did have sufficient knowledge to leave them without any excuse for lying by and given no sign of dissatisfaction. For several years they received regular annual accounts. These accounts showed the character of property and in what it consisted. It further appears that in 1870 each of the complaints received from the book-keeper in Rhode Island a list of all the stocks and securities in which they were respectively interested. It also appears that they accepted the stock of the Quidnick Company, and they make no complaint of that part of the settlement.

Without further discussion, it suffices to say that the complaints came into court too late to obtain relief, even if when they came of age they could have justly complained of the conversion of their property into the stock of the corporations. In such cases, it is not merely a question as to what information respecting their rights parties do actually obtain; but as to what information they might have obtained had they used the means and opportunities directly at their command. Others, acting in good faith, also have rights; the world must move; and it is the interest of the community that controversies should have an end."

It has often been held that no mere technical defence can excuse laches.

In Wagner *vs.* Baird, 7 Howard, on p. 258, the court says:

"Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot

be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, *which will appeal to the conscience of the Chancellor.* The party guilty of such laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment, or *technical disability.*"

Without citing further from the innumerable throng of authorities on this subject, we submit that the rule in equity on this subject is that wherever there has been unreasonable and unnecessary delay in commencing suits when the parties knew or might have known of their rights, courts of equity will not exercise their powers unless a very strong case of injustice or hardship is clearly made out, they will not interfere on any merely technical question or pretence to destroy rights which have been long vested, and especially so when the result of such action would be to injure persons who have acted in good faith, relying on the validity of the proceedings which are asked to be set aside.

Applying these principles to this case it is difficult to conceive of a case where the rules of justice and equity more clearly demanded that a court of equity should refuse to interfere.

The suit of J. B. Colt was brought expressly for the purpose of settling the rights of all the legatees under the will of Samuel Colt in the residuary stock. These plaintiffs were all made parties and duly served with process, able counsel appeared for them and fully presented their claims. Isabella and Edward were then of age, LeBaron was twenty, Samuel P. was the only person really incompetent to act for himself, and he had his mother for guardian, an elder brother Edward of full age and who took charge of the matter and whose interests were identical with Samuel's, and who employed competent counsel. The case was fully heard on two occasions, and being one of so much importance was very fully and carefully considered by the court, which finally rendered a decision adverse to the claim of these plaintiffs, and decided

who the residuary stock should be divided among, and in what proportions.

All these plaintiffs acquiesced in the decision of the Court of Errors, and in the same year the residuary stock was distributed under orders of the Court of Probate, and very large sums of back dividends paid over to the persons who the Supreme Court said were entitled to them. These plaintiffs received their share both of stock and dividends and gave receipts therefor. They made no claim that the decision was wrong, or that their claims had not been conclusively settled. In 1870 a further settlement was made, and in 1873 a final one was made after the youngest of the plaintiffs had come of age, and they all of them met the executors with counsel of their own, one of them then being a lawyer himself, and after a full examination they received the balance of the stock and dividends to which they were entitled in accordance with the decision of the Supreme Court, and gave full releases and discharges purporting to release and settle all claims of every kind. Up to this time they had ample means of knowledge as to every thing that had been done, and had never intimated in any way that they held in reserve a claim that all these payments and settlements were invalid as to them.

Now, just as the bar of the statute of limitations was within five days of being completed, they commence these proceedings, and claim to make their executors liable for the payment to them of hundreds of thousands of dollars which they have seen and permitted them to pay over to others and to unsettle and reverse the whole settlement of the estate.

Surely if any thing could ever constitute laches it is this.

If however all these claims are erroneous and this court sees fit to disregard the decisions of the courts of Connecticut and try these questions *de novo*, we submit that it will come to the same result.

SECOND.

If the decisions of the Supreme Court of Errors of Connecticut were open to review in this case, it would be found that those decisions are correct—

First: as giving the natural and reasonable interpretation of the language used in the will and codicils;

Second: as in full accord with the current of the judicial decisions in this country and in England in similar cases.

I.

Those portions of the will and codicils important to be considered in connection with said decisions are the following, from the original will, executed June 6, 1856, Record, pp. 56, 57, and 60:

"To my brother, James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement during his life of five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, and after the death of my said brother, to his issue lawfully begotten, as an absolute estate. This bequest is on condition that said James B. Colt shall waive and relinquish all claims and demands, actual or pretended, which he may have against me or against said Colt's Patent Fire-arms Manufacturing Company."

"I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate." * * *

"To the children of my late brother, Christopher Colt, I give and bequeath as follows: To Isabella DeWolf Colt an annuity of seven hundred and fifty dollars per year, until she shall

arrive at the age of twenty-one years, to be appropriated to her support, maintenance, and education; and when she shall have arrived at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company. To each of the other children of my said brother, Christopher Colt, I give and bequeath an annuity of five hundred dollars a year, until they shall respectively arrive at the age of twenty-one years, for their support, education, and maintenance; and to each of said children last named, as they shall arrive at the age of twenty-one years, a legacy of twenty-five hundred dollars in gross, and also one hundred shares of stock in Colt's Patent Fire-arms Manufacturing Company, to have and to hold to them and their representatives and assigns forever." * * *

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire-arms Manufacturing Company of which I shall die possessed shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given."

From the first codicil, executed January 12, 1858, Record pp. 61 and 62:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct toward me, the legacy of five hundred shares of the stock of Colt's Patent Fire-arms Manufacturing Company, given in the aforesaid will to James B. Colt, for life, remainder to his children; and, in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose." * * *

"I also revoke and cancel the legacy given in said original will to the children of my late brother, Christopher Colt, so far as the oldest son of my said brother is concerned, and so far only; and in lieu thereof I give and bequeath to said oldest son one-fourth part of what he would have received if the legacy to him in said original will had not been revoked."

From the second codicil, executed February 2, 1859, Record, pp. 62 and 63:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them.

"I give to the eldest son of my brother, Christopher Colt, a legacy of one hundred dollars and no more, and all legacies heretofore made in his favor are cancelled and revoked; and I hereby give, bequeath, and devise to the other children of my said brother (said eldest son not being included herein) the property, to wit: five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of the said James B. Colt, and I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil as and for my last will and testament."

The testator died, and the will and the two codicils were proved and approved, and ordered to be recorded in the Probate Office of the Probate Court within the County of Hartford and State of Connecticut, on the 6th of February, 1862.

On the 1st of June, 1864, the said James B. Colt brought a suit in equity in the Superior Court of the State of Connecticut for the county of Hartford. This suit was commenced by a petition. It set forth a copy of the will and of each of the two codicils. It claimed that James B. Colt had thereunder an interest, absolutely or for his life, in such proportion of the excess of the stock of said company owned by the testator at the time of his death, above the amount of stock disposed of in said will, as 500 shares bears to the whole amount of legacies thereof given in said will. It set forth the names of the persons then living who were interested in the 9,996 shares. It set forth as so interested, among others, Isabella DeWolf

Colt (then unmarried) and the said Edward D., LeBaron B., and Samuel P., and averred that Theodora D. Colt (who is the same person as the plaintiff, Theodora G. Colt) was the guardian of the last named three persons; that the inventory of the estate amounted to $3,257,644.63; that none of said stock or the dividends thereon would be needed to pay debts, and all thereof could be transferred and paid over to the legatees entitled thereto; that the executors had received dividends on the stock in which the petitioner was interested, but they denied that he had any interest in any of said stock or dividends; and that the amount of the stock and dividends to which he was entitled was over $200,000. The petition went on to say: "And this petitioner avers that the respondents to this petition, and each of them, have, or claim to have, some interest, either legal or beneficial, in said residuary portion of said stock, and that it is necessary that they, and each of them, should be made parties to this proceeding, that their respectives rights in said residuum may be so ascertained and fixed as to be binding on all said parties." The petition prayed that the Court would "ascertain and fix the amount of said residuum, and the parties entitled thereto, and their proportions under said will," and that the executors pay to the petitioner the dividends already collected or due, with interest, belonging to the shares of stock in which he held an interest under said will, and that he have the future dividends thereon.

The present plaintiffs, together with all the legatees of stock named in said will or codicils, were made parties respondent to said petition.

The defendants filed a demurrer, and the parties were at issu thereon, and the questions arising upon this issue were reserved for the advice of the Supreme Court of Errors of the State of Connecticut, which case is reported in 32 Conn., page 422.

The main question considered by the Connecticut Supreme Court in this case was, whether the revocation in the first codicil of the legacy of five hundred shares which the will had

given to James B. Colt for life, with remainder to his issue absolutely, applied to and canceled the bequest to James B. Colt in the will of his rateable proportion of the residuary stock. The Court held that it did not so apply and therefore over-ruled said demurrer.

The opinion and reasoning of the Court is so fully discussed and commented upon by Judge Blatchford in his opinion, which is a part of this Record, see page 234, that we forbear to examine it at length in this brief, further than to say, that the primary legacy of five hundred shares, and the legacy of residuary stock, are found widely separated in said will, and the bequest of the residuum of the stock seems to have no connection with the several primary bequests of stock, except as these latter bequests are referred to for the sole purpose of determining the persons to whom the residuary stock is given, and the number of shares to be received by each legatee.

The language of the revocation is, "I also revoke and cancel"—"the legacy of five hundred shares of the stock given in the aforesaid will to James B. Colt, for life." No reference is here made or intimation given that the testator intended to take away from James B. Colt anything except this five hundred shares. The language is descriptive of the primary legacy and of none other. So also, in the gift even, the language is "and in lieu thereof I give and bequeath said five hundred shares of stock," which language is equally definite, descriptive, and limited.

Even if the bequest to James B. Colt, of a proportionate share in the residuum of the stock, could be regarded as so united to the primary bequest to him of the five hundred shares that the two together should be treated as a single legacy or bequest, still it was a bequest in two parts, one of the five hundred shares, and the other a proportionate share of the residuum. In the codicil that part only, to wit, of the five hundred shares, was revoked, that being particularly described in the revoking clause, leaving the remaining part of the legacy to stand undisturbed.

The suggestions made by the plaintiffs that because the

testator states that he makes this revocation of the legacy to James B. Colt, "for reasons growing out of his late unbrotherly conduct toward me," therefore it must be inferred that he meant to revoke all legacies to James B. Colt, is entitled to little weight. The testator may have felt called upon by the "unbrotherly conduct" referred to to take away from James B. Colt the five hundred shares he had previously given him, and yet may not have desired to leave him penniless.

So also the claim of the plaintiffs, that it is inconsistent that the testator should have intended to revoke this gift of five hundred shares to James B. Colt, and not the gift of a share of the residuum while the same five hundred shares went to increase the residuum and thereby increase his interest in the residuary stock, loses its whole force when we remember that the five hundred shares revoked did not go into the residuum at the time this codicil was made, but was given directly to the school trust, and that it was more than a year afterwards when he concluded to revoke this school trust and thus throw this stock into the residuum.

The Superior Court, under the advice of the Supreme Court of Errors, having overruled the demurrer, the parties were again at issue under a general denial of the allegations in the petition, when the Superior Court found the facts, and again reserved the case for the advice of the Supreme Court of Errors, and especially upon the following questions arising on the record:

"1. Whether the interest taken in the residuum by James B. Colt is a life estate or an estate in fee. 2. Whether said Colt shall receive interest upon the dividends made on his residuary stock, and if so from what time. 3. Have the legacies which the children of the testator who deceased in his lifetime would have taken had they survived him, lapsed, or are they to be considered and treated as intestate estate? 4. Do the said said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will? 5. Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock

under said will, or only one of them, or neither of them? 6. What is the amount of the residuum of stock, and who are entitled thereto, and in what proportions? This Court also reserves all other questions arising upon the record, and also the question as to what decree shall be passed in this suit."

The said Supreme Court of Errors, at its February Term, 1866, for Hartford County, made an order in said suit in equity, reciting the parties, and the reservation of said questions for its consideration and advice, and then proceeding: "And now said parties having been fully heard, this Court doth consider and doth advise said Superior Court: 1st. That the interest of James B. Colt in the residuum of stock is a life estate only; 2d, That James B. Colt is not to receive interest on the dividends of stock, unless the Superior Court, on further inquiry, find that interest has been made by the executors, or the money has been used by them, or by the Arms Company in their business, so that they may fairly be said to have made interest upon the money, either directly or otherwise; 3d, That the legacies to the deceased children who died before the testator are to be treated as intestate estate; 4th, That the children of Christopher do not take any share in the residuum of stock, in respect to their legacy of 500 shares given to them in the codicil of said will; 5th, Jarvis takes, Deming does not. The amount of residuum of stock is 5,346 shares, of which Mrs. S. Colt takes $1,149\frac{2}{31}$; J. B. Colt, for life, $574\frac{2}{31}$; Samuel C. Colt, $574\frac{6}{31}$; Henrietta Colt, deceased, $574\frac{6}{31}$; Elizabeth E. Colt, deceased, $574\frac{6}{31}$; Samuel J. Colt, deceased, $574\frac{6}{31}$; Christopher's children, $459\frac{7}{31}$; Cadwell H. Colt, $574\frac{6}{31}$; R. D. Hubbard, executor, $57\frac{15}{31}$; R. W. H. Jarvis, executor, $57\frac{15}{31}$; Mrs. E. H. Colt $57\frac{15}{31}$; L. P. Sargeant, $57\frac{15}{31}$; E. K. Root, $57\frac{15}{31}$."

Afterwards, at its March Term, in 1866, said Superior Court passed a final decree in accordance with said advice of said Supreme Court.

This last decision of the Supreme Court is reported in 33 Conn., page 270.

The plaintiff's claim that in this case the Court again erred

in holding that the bequest in the second codicil to the children of Christopher Colt, of five hundred shares of stock, given in the original will to the executors in trust for the children of James B. Colt, did not carry the bequest of the share in the residuum of said stock given in said original will to the executors in trust for the children of said James B. Colt, all the legacies to the children of said James B., or for their use or benefit, having been revoked by said codicil. To this claim, the language of the codicil is a full and complete answer. In the revoking part of this codicil the following language is used:

"And I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children, or any of them."

(Referring to the children of James B. Colt.)

The legacies in which said children were then interested, and which were taken away from them by this clause of the codicil, were the following:

First: The legacy of a proportionate share in the residuary stock to James B. Colt, for life, remainder in fee to his children, which had not been revoked, as we have already seen.

Second: The primary bequest of five hundred shares to the executors, in trust, for the use and benefit of said children.

Third: The bequest to said executors, in trust, of a proportionate share of the residuary stock, for their use and benefit.

The testator does not specifically describe either of those bequests, but uses apt and pertinent language to revoke them all.

Upon the theory of the plaintiffs, in this revoking clause, he would have simply named and described the primary bequest of five hundred shares to his executors, in trust, upon the ground that a revocation of the primary bequest necessarily operated as a revocation of the proportionate share of the residuum, but the testator did not so express himself. When he desired to revoke the primary bequest alone, as in the case of James B. Colt in the first codicil, he simply refers to and

describes the primary bequest; but when he desires to revoke all bequests, whether primary and residuary, he uses language appropriate to accomplish his purpose.

Again: this revocation is not a mere revocation of the uses or trusts named in the primary legacy, in the original will of five hundred shares, to the executors, but is an absolute revocation of all "legacies or devises" "made *to or for* the use and benefit of said children."

The gift over to the children of Christopher Colt is a new and independent bequest, and the language is not equally broad with that in the revoking clause.

It is as follows:

"I hereby give, bequeath, and devise to the other children of my said brother (to wit: Christopher Colt) *the property, to wit: five hundred shares* of the stock of the Colt's Patent Firearms Manufacturing Company, *which in and by said original will* is bequeathed to my executors in trust for the use of the children of said James B. Colt," etc.

Now let us suppose that by the original will five hundred shares of said stock were bequeathed to the children of James B. Colt, and by a subsequent legacy five hundred and more shares were given to the same children out of the residue, even if the latter shares were to be added to, joined to, or even made a part of the primary legacy of five hundred shares, yet when the testator gave to the children of Christopher only the five hundred shares first given to the children of James B., and made no reference to the other shares he had given them, there can be no inference or presumption that he intended to give Christopher's children more than five hundred shares, because he gave to James B's children more.

In his gift to Christopher's children he limited his legacy to five hundred shares, and five hundred only. If he had intended to give to Christopher's children, in addition to the five hundred shares, the interest in the residuum which he had given to James B. Colt's children, nothing was easier than to have said

so. But as he did not intend it he did not say so, and we claim he did not intend it because he did not say so.

If the testator had intended to substitute, as claimed by the plaintiffs, the children of Christopher for the children of James B., he would have used some appropriate language to show that the children of Christopher were to succeed to all the legacies or devises which he had taken away from the children of James B.; but there is nothing in the codicil indicative of such a purpose.

We understand the plaintiffs to claim, further, that although the primary legacy to James B. Colt's children and the subsequent legacy in the residuum of the stock may be distinct and separate legacies, yet the subsequent revocation and gift over to the children of Christopher of the five hundred shares of the primary legacy so substituted the children of Christopher for the children of James B. that the children of Christopher answer the description of legatees in the original will, and that they take the share in the residuum given to persons to whom "I have hereinbefore given legacies of stock," etc.

Now, when the original will was made, this primary legacy was to the children of James B. Colt, and afterwards in the same will another legacy was given to the same parties.

By the codicil the first legacy is revoked, and no reference made to the second.

There is no system of reasoning or sophistry by which persons subsequently named in a codicil can be held to be the persons "to whom I have hereinbefore given legacies of stock."

The legacy of five hundred shares in trust for the children of James B. Colt was a primary legacy.

The legacy of a share in the residuum was a subsequen legacy.

The revocation of the one, and a gift over of the same, ha nothing to do with the other.

Legacies must be given by a testator, and not by a court.

II.

The views of the Supreme Court of Connecticut, as expressed in each of the two cases referred to, are fully sustained by the authorities.

We do not here cite all the authorities which were brought to the attention of the Court of Errors, as appears in the evidence of the defendants, but only a few which seem to be conclusive.

We also cite decisions made since those in Connecticut, which fully sustain them.

In the case of Hall *vs.* Severne, 9 Simon, 515, the head-note is as follows:

"Testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his *before-mentioned* legatees in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees in addition to what he had given to them, or any of them, by his will. Held, that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil."

So in Roach *vs.* Haynes, 6 Vesey, 153.

The testatrix bequeathed a specific fund, over which she had a power of appointment, together with certain specific articles, to trustees in trust for her residuary legatee "hereinafter" named, and then bequeathed the residue to A. Afterwards, by a codicil, she revoked the bequest of the residue and gave it to A and B. It was held that this was no revocation of the specific bequest.

But the plaintiffs insist that the case of Carrington *vs.* Payne, 5 Vesey, 404, establishes a contrary doctrine.

First, we wish to say that this case is of doubtful authority. See 1 Jarman on Wills, p. 348, ed. 1880.

But let us examine the case.

The testator by his will gave to trustees certain real estate and also certain personal estate, and directed that the personal estate should be invested in real estate, and provided that all such estates should be settled on Wm. Pearce, etc. In a codicil he provides as follows:

"I do hereby *revoke* so much of my said will as directs the settlement of my *said estates* to the said Wm. Pearce for life, and *all* the subsequent limitations; and instead thereof do direct, that in and by the settlement to be made of *my said estate*, as aforesaid, the *same estates* to be limited from and after the decease of the said Edward Pearce and failure of issue male of his body to the following uses: that is to say, to the use of the said George Pearce, etc."

In this case the codicil expressly revoked so much of the will as directed "the settlement of *my said estates* to the said Wm. Pearce for life," etc., and directed the *same estates* to be settled on George Pearce, etc.

As we understand, the point raised was that the codicil, where it spoke "of my said estate," only included the real estates then owned and which were given to the trustees and did not include the estates which by the will the trustees were directed to purchase out of the personal property given to them to be settled on the same uses, and that the provision in said codicil that the "same estates" should be settled on George Pearce, etc., should be subject to the same limitation.

The court held that as by the original will the whole property was given to trustees, and the language of the codicil only changed the direction as to the settlement to be made, the language of the codicil was broad enough to cover all the estates contemplated and named in the original will.

Now whether this case was decided right or wrong is of little consequence in the case at bar.

In 1 Jarman on Wills, heretofore referred to, p. 348, it is said, "unless Lord Carrington *vs.* Payne can be referred to the distinction above suggested (that is, that it was not a re-

vocation as to the union of the estates but merely an alteration in the order of the limitations to be inserted in the settlement of both properties) which is very doubtful, it seems to be untenable."

How the decision of that case can give any countenance to the idea that because a bequest to A being revoked and given to B, it is therefore to be assumed that another independent bequest to A is to be presumed to be revoked and given to B, is difficult to see.

But since the decision of Carrington *vs.* Payne we have the case *in re* Gibson's Trusts, 2 Johnson & Hemming, 656, in 1861, before Vice-Chancellor Wood, afterwards Lord Hatherly and Lord Chancellor.

This case seems to be almost precisely the case now under consideration.

The testator bequeathed several pecuniary legacies, including one to A, and the *residue* to his *before-mentioned legatees in proportion to their pecuniary legacies;* and by codicil executed after A's death, gave A's pecuniary legacy to B, but was silent as to the residue. It was held that B was not entitled to A's share of the residue.

The Court reviewed the facts and the decision in Lord Carrington *vs.* Payne, and distinguished it from the case under consideration, and the Court uses the following language, which would be equally applicable to the construction of Colt's will.

In making the codicil in question, the testator had his will present to his mind. He had before him not only the legacies bequeathed by his will to the several pecuniary legatees *nominatim*, but also the legacies in his will to the same legatees of his residuary personal estate.

"Yet in the codicil he refers exclusively to the pecuniary legacies and takes no notice of the residue. Under such circumstances, I cannot hold that the codicil had the effect of passing to the legatee under the codicil not only the legacy given to him by the codicil, but also a share of the residue, as to which it is totally silent."

See also 1 Jarman on Wills, with American notes by Randolph & Talcott, ed. 1880, p. 347.

Bridges *vs.* Strachan, L. R., 8 Ch. Div., page 558, decided in 1878, was a case very closely resembling the case of Carrington *vs.* Payne, and upon the hearing before Vice-Chancellor Malins it was strenuously insisted by learned counsel that his decision should be governed by that case.

In this case of Bridges *vs.* Strachan where the testator gave to trustees certain real estate to be held on certain trusts, and also bequeathed to the same trustees £3,000 to be invested in lands to be held on the same trusts, but by a codicil he revoked and gave to another party his real estate without alluding to the £3,000, it was *held* there was no implied revocation of the bequest of £3,000.

And the Court says in giving the opinion:

"I think that notwithstanding the case of Lord Carrington *vs.* Payne, no revocation takes place unless a clear intention is expressed."

So in the case of Wetmore *vs.* Parker, 52 N. Y., 450, which was decided in 1873.

There were in this will certain specific bequests. The residuary clause gave the residue of the estate to the *several legatees thereinbefore named in proportion to the amount of the specific bequests.* Afterwards the testator by a codicil revoked one of the specific bequests.

It was held that the reference in the residuary clause of the will to the prior legacies was simply for the purpose of identity and description, and that the legacies were independent.

And so it was held that the revocation of the specfic bequest did not revoke the bequest of the residuum.

The opinion in this case was given by C. J. Church and he cites (p. 465) with approval the case of Colt *vs.* Colt, 32 Conn., 422.

In the late case of Johns Hopkins University *vs.* Pinckney, 55 Maryland, 365, decided at October Term, 1880, Judge Robinson, in delivering the opinion of the Court, says:

"In determining the question of revocation of a will by a codicil, all the cases agree:

1st. That the codicil does not operate as a revocation of a devise or a bequest in a will unless there is an express clause of revocation, or unless the provisions in the codicil are so inconsistent with the will that the two cannot stand together.

2d. If revocation is to be implied from inconsistent provisions, it will be limited to such provisions of the will as are plainly inconsistent with the codicil.

3d. Where the devise or bequest in the will is clear and free from doubt, the intention to revoke by the codicil must be equally clear and explicit. Jones *vs.* Earle, Ex'r., 1 Gill, 395; Lee *vs.* Pindle, 12 G. & J. 305; Doe *vs.* Hicks, 8 Bing. 475; Alexander *vs.* Alexander, 6 De G., M. & G. 593; Agnew *vs.* Pope, De G. & J. 49; Patch *vs.* Graves, 3 Drew, 348; Williams on Ex'rs. (6th Am. ed.), 220; 4 Kent, 531. The governing principle which lies at the bottom of these well-settled rules is, the intention of the testator is to be ascertained from the face of the will and codicil construed as one instrument."

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Also; "where a bequest is thus made in clear and unambiguous terms, it would be against every sound principle of construction to permit such a gift to be revoked by doubtful expressions in a codicil. As a general rule, it is said, that in order to revoke a clear devise, the intention to revoke must be as clear as the devise. Williams on Ex'rs. (6th Am. ed.) 220; Quincy *vs.* Rogers, 9 Cush. 295; Lee *vs.* Prindle, 12 G. & J. 228. Bosley *vs.* Bosley, 14 Howard, 395."

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